

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1112

To be argued by
JAY GOLDBERG

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1112

BP/s

UNITED STATES OF AMERICA,
Appellee,

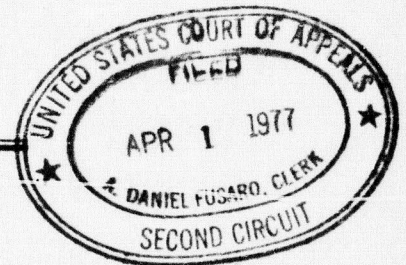
—vs.—

GEORGE FREDERICK RIKER, et al.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX FOR APPELLANT
GEORGE FREDERICK RIKER**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

GEORGE FREDERICK RIKER,
Defendant-Appellant.

INTRODUCTION

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Owen, J, on February 3rd, 1977, after a jury conviction under count one charging a violation of 18 USC 371 (conspiring to violate 18 USC 659 in agreeing to steal the contents of a motor truck and other vehicle), count two charging a violation of 18 USC 659 and 2 (possessing chattels stolen from an interstate shipment), count three charging a violation of 18 USC 2312 (transporting in interstate commerce a motor vehicle, to wit a tractor-trailer), count four charging a violation of 18 USC 2312 (receiving and concealing the said vehicle).

Sentence was imposed as follows: Four years on each count, to run concurrently to each other. Appellant was admitted to bail pending appeal by the District Court.

THE FACTS

The Government's Case

On February 5th, 1976 a tractor-trailer loaded with thousands of dollars of meat in the Midwest on a run east, was stolen from a Motel in New Jersey where it had been parked for the night. The claim was that Appellant drove the vehicle to the home of Ronnie George Hamilton in Nanuet, New York where in the next several days Appellant and the co-defendants, along with Hamilton, unloaded the trailer for sale and personal use.

On February 9th, 1976, Appellant was arrested at the truck site and made false exculpatory statements to an FBI Agent. The main factual witnesses for the government were Hamilton and his wife.

Hamilton testified that he had met the Appellant in 1970 and from time to time had worked for him at Appellant's chrome plating shop in New Jersey (*Tr. 181, 184).

*References are to trial minutes

Chrome plating was explained as the business of decorating portions of trucks and trailers. He testified that Appellant's business consisted of plating tractors (346, 349). In December, 1975 Hamilton was doing a chrome job at Appellant's place of business for an individual whom Appellant had then identified as a man named "Drew" (183). Hamilton saw the man (184). Appellant in late December - early January told Hamilton that Drew was going to be obtaining a used tractor-trailer and he asked for Hamilton's help in chrome plating it (184-5). It was understood that instead of taking such a vehicle to a dealer to incur the cost of dismanteling the parts needed to be plated, the vehicle would be taken apart by Hamilton at his home (185).

Shortly before midnight, Thursday February 5th, 1976 when Hamilton arrived at his home, he found the vehicle, referred to in the indictment, with Appellant in the cab. (187). Appellant said: "Well, the guy finally got it. Here it is." (187) Hamilton was to disconnect the pieces which had to be chromed and bring it to appellant's shop (185). Appellant had indicated Drew wanted the vehicle also painted and he and Hamilton went looking for a

garage big enough to put the vehicle in so the work could begin. (189)

On February 6, 1976 efforts to find a garage large enough to contain the vehicle failed and it remained parked in Hamilton's driveway.

On February 7, 1976, Appellant and two other people unloaded meats from the trailer. (196) Appellant said the truck was a repossessed vehicle, the insurance company had "already taken care of it being the truck was repossessed and it (the contents) was just there to get rid of,..." (204) The unloading continued on February 8. On February 9 Hamilton began work on the tractor (224). That day, however, he was arrested along with Appellant and others at the truck site by FBI Agents.

In winding up the direct examination, the prosecution inquired whether after the February 9 arrest, Hamilton had ever spoken to Appellant and the conversations which took place. The purpose was to elicit evidence of consciousness of guilt, i.e. that Appellant asked Hamilton to say that one of the men at the site was there to obtain

a dog (288-290). On the theory that the government had opened the door to the whole of the conversation, the defense later, on cross, sought to elicit that in the post arrest conversation Appellant denied any knowledge that the vehicle had been stolen or the contents thereof unlawfully taken. This was pressed on the theory that since the testimony was permitted on the state of mind of Appellant, i.e. his consciousness of guilt, it was proper to permit other statements showing his consciousness of innocence at the very same time (435-453, 469). The Court did not permit the conversation to be completed on Hamilton's cross examination.

Cross examination of Hamilton made it clear that Appellant was in the business of possessing such vehicles from time to time as part of his occupation and that Appellant had claimed as far back as December that "Drew" was going to be bringing in a large vehicle for chroming. (346, 349, 353-6, 369-372).

Neither the openings nor the cross examinations conducted by any counsel raised any issue that Hamilton's testimony was the result of recent fabrication. It was the prosecutor who first raised the matter on direct of

the government arrangement with Hamilton, that he would not be prosecuted were he to cooperate. (290-1) Counsel did not exploit this in cross or in their openings. Nonetheless, the Court received a prior consistent statement (1439-1442, see 492, 1052 - 1065).

Jay Hamilton took the stand and corroborated her husband's testimony. She testified that Appellant had said the truck belonged to a friend who bought it from a repossessor (588). Her testimony was important to the prosecution since on the evening of the arrest, February 9, 1976 a co-defendant Erm came to her house, dropped off \$400 and told her that it was money owned Appellant for the meat they had sold (608). To the defense her testimony was important since it indicated that from the time of the arrest of her husband, her motive and that of her husband's was one of cooperation and the hope of not being prosecuted. The day of the arrest - before Hamilton gave his prior consistent statement admitted at p. 1439-1442, the family had been told by the FBI agent that "he didn't think that they would prosecute him". (655) This piece of testimony will become important to our later discussion

about the admissibility of the prior consistent statement since the motive which prompted the earlier statement and the trial testimony of Ronnie Hamilton as well was the same, i.e. to avoid prosecution by winning the favor of and cooperating with the prosecution.

FBI Agent Fitzpatrick testified that when he first questioned Appellant initially on approaching him, he denied knowing the contents of the trailer (921). Later on, Appellant did state that he had obtained the vehicle from Drew Holbrook who wanted parts rechromed. And several days later, Holbrook called to say that he wanted the trailer also painted. Appellant acknowledged that he knew the contents of the vehicle after work had commenced on it and that he believed that Holbrook had obtained the vehicle properly. He described Holbrook (929-32).

The government concluded the case in chief with the reading of the prior consistent statement of Hamilton (1439-1442).

The Appellant's Case

The Appellant's brother, Warren Riker testified that on February 5th Appellant received a call and said he had to meet Drew at a Diner (1237), that Drew had gotten

a truck (1236,39).

John Ardito, Appellant's partner in the chrome plating business knew Drew Holbrook, did work for him and saw him as late as December - early January, 1976 (1259, 1260, 1264, 1284, 1285).

Appellant, George Frederick Riker testified (1304). He had no previous criminal record, was married, the father of two infant children and he was honorably discharged from the service.

On February 5, Drew Holbrook had called and asked that he meet him at a diner (1311, 1312). Holbrook told him the previous owner did not finish delivering the load when it was repossessed and there was still some meat on it which Appellant could dispose of (1324). Holbrook was someone with whom he had done business in the past. (1336) Originally, Appellant was to chrome parts of the tractor. The next day Holbrook called to say that he wanted the tractor and trailer painted. All Appellant could offer as to the whereabouts of Holbrook was that he believed he worked for a company called AFCO in California (1357-58). He admitted that initially he lied to

Agent Fitzpatrick, but attributed that to upset and nervousness. He was impeached on cross examination by his Grand Jury testimony as to the name of the diner where he met Holbrook on February 5, 1976 and first saw the vehicle in question. He asserted his innocence. (1334)

The Court's Charge

As to the substantive counts, the court made it crystal clear that the government had to prove that Appellant knew the property was stolen, but it was not necessary to prove that he knew the goods were moving or had been a part of interstate commerce. The government's position was buttressed by an instruction as to the inference which may arise from recent possession of stolen property as to all substantive counts.

POINT I

THE COURT ERRED WHEN IT PERMITTED
THE GOVERNMENT TO BOLSTER THE
TESTIMONY OF ITS KEY WITNESS
BY A PRIOR CONSISTENT STATEMENT

We are here addressing ourselves to Government Exhibit 3522 which was read to the jury at pp. 1439-1442. It was a post arrest statement of Ronnie Hamilton given to

an assistant United States Attorney on February 10th, 1976. It was read to the jury at the conclusion of the government's case in chief and after Hamilton had testified. The government offered it on Hamilton's redirect at p. 492 on the theory that counsel for the co-defendant Erm had opened the door by suggesting that Hamilton's trial testimony was the result of Hamilton having not been prosecuted, which decision was not arrived at sometime during the summer of 1976, i.e. well before his trial testimony. Thus, his consistent statement given earlier on February 10th which antedated his "reward" from the government was admissible. A final ruling awaited the conclusion of the government's case in chief.

There was extended discussion on the point. (See 492, 1052 to 1065). We are concerned with Rule 801(d) (1) (B). Counsel for the government pressed that this Court has been liberal in supporting the receipt of such proof (1055). However, until the enactment of Rule 801 (d) (1) (B) such proof was received solely for rehabilitative purposes. With the enactment of the Rule and the breadth of Clause B, the prior consistent statement takes on

added importance for it is now admissible as evidence in chief. (Weinstein's Evidence, Vol. 4, p. 801-99).

The government argued that there was an attack on Hamilton's trial testimony as the product of recent fabrication (1053). The trial transcript reveals the following (1) no counsel attacked Hamilton's trial testimony as recently fabricated or the result of the government's decision not to prosecute him. This was not suggested in the openings of counsel or their cross examinations. (2) but of more importance, even if the suggestion were that his trial testimony was given in the hope of favorable treatment from the government or bias in favor of the prosecution, it was clear that at the time the court ruled, after having heard the government's case, Hamilton had the same motive, bias in favor of the government - hope of reward - when he gave his February 10, 1976 statement as he did when he testified. Thus, as early as the day of the arrest, February 9th, the Hamilton's had been told by a government official that he did not think Hamilton would be prosecuted (655). And from the day of the arrest the Hamiltons hoped that this would be so. Mrs. Hamilton

even communicated some helpful information to the FBI agent the evening of the day of arrest by calling him on February 9th, 1976. Thus, from the time of the arrest Hamilton's motivation was not one of securing an acquittal in a trial on the merits, but rather winning the favor of the government by cooperating and hoping for a declination of prosecution. And to be sure, the first counsel to raise the matter of the reward received by Hamilton was not the defense, but rather the prosecutor (290-1).

Judge Learned Hand, in DiCarlo v. U.S., 6 F2d 364, 366, after a careful examination of authorities and reasons stated the exception thus: "that when the veracity of a witness is subject to challenge because of motive to fabricate, it is competent to put into evidence statements made by him consistent with what he says on the stand, made before the motive arose". See also cases collected 4 Wigmore, Evidence, Section 1129.

This Court, at a time when receipt of such proof was for the limited purpose of rehabilitation, has always focused on the issue of whether the prior consistent statement antedated the motive attributed to the government

witness, either in cross or on the openings. U.S. v. Di Lorenzo, 429 F.2d 216 at 220 (2d Cir. 1970). Thus in the case of U.S. v. Dorfman, 470 F.2d 246 (2d Cir. 1973), the Court emphasized an analysis that would focus on whether the motive prompting the trial testimony was different from that which prompted the prior consistent statement.

The Court wrote:

The defense had attempted to show that Horvath had motives of personal revenge for falsely implicating Dorfman. These alleged motives were based upon events which occurred after Horvath's statements to Rubin. Rubin's testimony was therefore admissible to show that Horvath had implicated Dorfman before the time of the events providing the basis for the alleged motives for falsification. This exception to the hearsay rule for "prior consistent statements" is well established. See United States v. DiLorenzo, 429 F.2d 216, 220 (2d Cir. 1970). cert. denied, 402 U.S. 950, 91 S.Ct. 1609, 29 L.Ed. 2d 120 (1971); United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), rev'd on other grounds, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2d 931 (1957); Proposed Federal Rules of Evidence, 801 (d) (1) (B) (adopted on November 20, 1972).

(underlining in original)

In addition, this Court has carefully considered whether the defense truly opened the door to the prior consistent statement. In U.S. v. Zito, 467 F.2d 1401 at 1407 (2d Cir. 1972) the court examined the record and found:

Examination of the record convinces us that these statements were admissible. The defense attorney's opening statement to the jury and his persistent inquiries during the cross examination reflected an intense interest in the fact that Doran had committed many crimes in his attempts to raise money for the Zitos for which he had not been indicted. In this manner "the defense at least suggested to the jury that (the prosecution's principal witness) hoped for clemency for himself, and that his trial testimony was a fabrication, as a reward for which he hoped to go unwhipped of justice". People v. Singer, 300 N.Y. 120, 123, 89 N.E.2d 710, 711 (1949). A trial judge normally has great discretion in determining if a prior consistent statement is authorized to rebut a defense charge of recent fabrication, Felice v. Long Island Railroad Company, 426 F.2d 192, 198 (2d Cir. 1970), cert. denied, 400 U.S. 820, 91 S. Ct. 37, 27 L.Ed 2d 47, and we cannot say here, in light of the obvious motive to falsify, that the trial judge erred in drawing the inference that the defense had suggested that Doran had concocted his story to escape punishment.

EDITOR'S NOTE

Pages *15* were missing at time of filming. If, and
when obtained, a corrected fiche will be forwarded to you.

Repeatedly throughout the charge, the Court utilized the boilerplate instruction as to the inference which may arise from the possession of recently stolen property (1694, 1712). Opposition to it and exception to it was taken before and after the charge (1488-9, 1495, 1498, 1499, 1731).

The Court correctly noted that this charge was taken verbatim from that sustained against a due process attack in Barnes v. U.S., 412 US 840 (1972). Barnes did not testify and he offered no meaningful explanation for his possession of stolen Treasury checks. Under these circumstances, there was no reason to modify what has been a standard charge since Wilson v. U.S., 162 US at 619. The difficulty in the case at bar, is that under the circumstances of the case, it is submitted, the charge unfairly aided the government in its obligation to prove knowledge and intent. Reliance is placed upon Freije v. U.S., 386 F.2d 408 at 410 (1st Cir. 1967). This Court has not rejected out of hand the analysis set forth in Freije, but rather has considered whether under all the facts and circumstances the instruction was appropriate.

U.S. v. Brawer, 482 F.2d 117 (2d Cir. 1973).

We contend in line with Freije that by reason of the defense case, the Court should have modified its boiler plate charge as to Appellant since his possession was explained by other facts and circumstances consistent with innocence, i.e. Appellant was in the business of possessing tractors and trailers in the course of his occupation as a chrome plater for such vehicles. And, he claimed to have been told that the vehicle was lawfully repossessed, the contents no longer needed by someone whom he believed to be the owner. Paraphrasing from Freije (at p. 410), the inference of unlawful possession of recently stolen property should find no legitimate application to one whose very business involves the taking, holding and possession of such property, in this case tractor-trailers.

POINT III

THE COURT ERRED WHEN IT REFUSED TO
PERMIT THE DEFENSE TO ELICIT THE
FULL EXTENT OF APPELLANT'S POST
ARREST CONVERSATIONS WITH HAMILTON

The government was permitted to inquire of Hamilton whether post arrest, he and the Appellant had any conversations. The purpose was to elicit evidence of consciousness of guilt, i.e. that Appellant asked Hamilton to say that one of the men at the truck site was there to obtain a dog (288-290). The defense argued first, that by the nature of the government's questions the door had been opened to the whole of the conversations and further, that with a piece of circumstantial evidence reflecting on the state of mind of the Appellant it was only fair that any statement made by the Appellant during the conversation denoting his consciousness of innocence be developed. (435 - 453, 469). This was refused. The offer of proof was that the witness would have testified that Appellant also stated that he was innocent of wrongdoing and had been set up by Drew Holbrook. While it is true the rule of completeness set forth in Rule 106 relates to written or recorded statements, there was no justification for ignoring the fact that the government opened the door to such proof by its broadly worded questions and on a subject of such tenuous

value as consciousness of guilt, fairness clearly dictated that the whole of the conversation be put in to enable the jury to determine from the whole of it whether the Appellant was in fact evidencing an awareness of guilt. There is no established limitation on the rule of completeness just because the conversation is unrecorded where the prosecutor has seen fit to open the door to the subject by broad questions. (McCormick on Evidence, Section 56).

A full discussion relating to the doctrine of verbal completeness may be found in 7 Wigmore on Evidence, Sections 2094, 2097, 2100. The clear rule is that in order to portray a true and accurate picture of what took place the conversation should be related in full, that being the inculpatory as well as the exculpatory.

This Court set it forth best when it wrote in U.S. vs. Corrigan, 168 F.2d 641 at 645 (2d Cir. 1948):

The doctrine of "opening the door" is an application of the principle of "completeness"; that is, if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detri-

mental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary. The rationale of the doctrine of completeness has been stated by Professor Wigmore: "To look at a part (of an utterance) alone would be to obtain a false notion of the thought. * * * One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation"; and again, "possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was"; consideration of the whole is needed "to avoid the danger of mistaking the effect of a fragment." The effect of "opening the door" has been well and tersely defined in *Hayden v. Hordley*, 94 Vt. 345, 349, 111 A. 343, 345: "(The rule) is protective, merely. It goes only so far as is necessary to shield a party from adverse inferences, and only allows an explanation or rebuttal of the evidence received."

The evidentiary ruling below substantially prejudiced Appellant.

POINT IV

THE APPELLANT ADOPTS ALL POINTS APPLICABLE
TO HIM RAISED IN THE BRIEFS OF CO-APPELLANTS

POINT V

THE COURT'S CHARGE ON REASONABLE
DOUBT WAS UNDULY FAVORABLE TO THE
GOVERNMENT

In part the Court charged:

One final word on this subject. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty, would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature cannot be proved by mathematical certainty.

(1682)

* * *

If you fail to find beyond a reasonable doubt that the law has been violated as to any defendant on any count, you should not hesitate for any reason to return a verdict of acquittal. But if on the other hand you should find that the law has been violated as charged, you should not hesitate because of sympathy or other reason to return a verdict of guilty as a clear warning that a crime of this character may not be committed with impunity.

The public is entitled to be assured of this.

(1726)

An exception was taken generally to the reasonable doubt charge (1743).

The first paragraph cited above was unduly favorable to the prosecution U.S. v. Shaffner, 524 F.2d 1021, 1023 (7th Cir. 1975). This Court noted as much in U.S. v. Magnano, 543 F.2d 431 (2d Cir. 1976), citing U.S. v. Barrera, 486 F.2d 333, 339 (2d Cir. 1973). In Barrera the Trial Court's instruction was not at all as favorable to the government as the one at bar. The "Mathematical Certainty" phrase was absent as was the admonition about "few persons, however guilty, would ever be convicted", were the rule stricter. Further, neither Barrera nor Magnano contains language set forth in the last quoted paragraph above. This language calls upon the jury to send a message to all malfactors. It is unduly inflammatory. There is no counterweight to this exhortation as to guilty verdicts when the Court dealt with a possible not guilty verdict.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

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George Frederick Riker
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APPENDIX

U.S. DISTRICT COURT
JUDGE **X2008** Assigned **U.S.**
0862
RIKER, GEORGE FREDERICK
2-3-77
07 22 76 0669
x0208
JUVENILE

U.S. TITLE/SECTION
18:371
18:659
18:2312
18:2313
OFFENSES CHARGED
Consp. to commit interstate theft.
Theft fr. interstate shipment.
Transp. of stolen vehicle.
Receipt of stolen vehicle.
2/14
ORIGINAL COUNTS
1
2
3
4
SUPERSEDING COUNTS

II. KEY DATES & INTERVALS
ARREST or U.S. Custody Began 2-9-76
Summons Served
First Appearance
INDICTMENT Information 7-22-76
High Risk Date
Indict. Waived
In Charging District
ARRAIGNMENT 7-29-76
1st Plea
Final Plea
TRIAL Trial Set For 11-29-76
Ver. Date
Trial Began 12-13-76
Trial Ended 12-23-76
Disposition of Charges 12-23-76
Convicted
Acquitted
Dismissed
On Government's Motion

MAGISTRATE
Search Warrant Issued
Summons Issued
Arrest Warrant Issued
COMPLAINT
OFFENSE in Complaint
DATE
INITIAL/NO.
INITIAL APPEARANCE DATE
PRELIMINARY EXAMINATION OR REMOVAL HEARING
WAIVED
NOT WAIVED
INTERVENING INDICTMENT
Tape Number
OUTCOME
HELD FOR GJ OR OTHER CEEDING IN THIS DISTRICT
HELD FOR GJ OR OTHER CEEDING IN DISTRICT SE

U.S. Attorney or Asst.
Robert J. Jossen
791-0043
ATTORNEYS
Carl D. Bernstein
485 Madison Ave N.Y.C. 10002
980-3890
-1430

Show last names and suffix numbers of other defendants on same indictment/information:
Erm-1, Giordan0-20'Brien-3.
DATE (DOCUMENT NO.) PROCEEDINGS EXCLUSADAB (IN)
7-22-76 Filed indictment.
7-29-76 Deft. (with atty. Carl Bernstein present) enters a plea of N/G. Bail limits R.O.R. extended to N.J. & S.D.N.Y. (0-5 Days Trial) CONNER, J.
8-9-76 Pld notice of appearance of Carl D. Bernstein as atty for deft
8-23-76 Filed Gov'ts. Notice of Readiness on or after 8/5/76.
Filed the following papers rec'd from Mag. Bernikow (Mag. #76-178)
Docket Entry Sheet
Criminal Complaint
Disposition Sheet
9-17-76 F.T.C. Held Trial Date Set for Nov. 29th @ 10:00 A.M. Owen J.
9-17-76 Bail for Dft. Riker Amended As Follows: \$20,000 P.R.B. & Bail Limits extended to Enclude Nevada. Owen J.

12-13-76 Jury Empanelled & Sworn - Case proceeds to trial as to all dfts.
 12-14-76 Trial Cont'd
 12-15-76 " "
 12-16-76 " "
 12-17-76 " "
 12-20-76 " "
 12-21-76 " "
 12-22-76 " "
 12-23-76 " " - Charge - Jury deliberations cont'd & cluded.

Jury verdict as follows:

Dft. Riker - Guilty - All Counts - Bail \$20,000.00 PRB
 Co-Signed by Wife to include New Jersey only. P.S.I. Ordered
 All Guilty Dfts. Sentence for Feb.3,1977 @ 2:15 PM. Owen J.

12-27-76 Filed UnSecured PRB in the amount of \$20,000.00 Co-Signed by
 Wife Helen M. Riker.

2-3-77 Filed Judgment & Commitment (Atty. Carl Bernstein Present)
 The Dft. is hereby committed to the custody of the Atty.
 Gen. or his authorized representative for imprisonment for
 a period of FOUR (4) YEARS on EACH Counts 1,2,3,&4 to run
 concurrently to each other. Bail is cont'd pending appeal.

.....Owen J.

Issued Commitment 2-7-77

2-7-76 Filed transcript of record of proceedings, dated 12-14-76

2-14-77 Filed Dfts. Notice of Appeal from Judgment entered 2-3-77.
 (mailed notice)

FINE AND RESTITUTION ON PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

CHARGE OFFENSE NO. ☐ JUDGE **XXXXXX** Assigned U.S.
 CHARGE OFFENSE NO. ☐ **0862**
 CHARGE OFFENSE NO. ☐ **0208** 1
 Disposition / Sentence

ERM, HARLD STEPHEN

Case Filed
No. Day

07 22

76 0669

01

U.S. TITLE SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

18:371
18:659

Consp. to commit interstate theft.
 Theft fr. interstate shipment.

1
2U.S. MAG.
CASE NO.

BAIL - RELEASE

☐ AMT ☐ Forfeiture
 Derived Set ☐ Post Release
☐ PSA

☐ 10% Deposit
☐ Surety Bond
☐ Bail Not Made
☐ Status Changed (See Docket)
☐ Prey Court Order

☐ On All Change
☐ On Lesser Offense
☐ On Governor's Discretion

☐ On Governor's Discretion

☐ On Governor's Discretion

☐ On Governor's Discretion

☐ On Governor's Discretion

☐ On Governor's Discretion

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II. KEY DATES & INTERVALS

ARREST or

U.S. Custody Began

2-9-76

Summons Served

First Appearance

High Risk Date

INDICTMENT

Information ☐

7-22-76

Indict. Waived ☐

In Charging District

Superseding
☐ Indict/Info ☐

ARRAIGNMENT

1st Plea

7-29-76

Final Plea

TRIAL

Trial Set For

11-29-76

Vair Date ☐

Trial Began

12-13-76

Trial Ended

12-23-76

MAGISTRATE

Search Warrant

Issued ☐Return ☐

Summons

Issued ☐Served ☐

Arrest Warrant Issued

COMPLAINT

OFFENSE

U.S. Complaint

DATE

INITIAL/NO.

INITIAL APPEARANCE DATE

PRELIMINARY EXAMINATION

OR

REMOVAL

HEARING

WAIVED ☐ NOT WAIVED ☐

INTERVENING INDICTMENT

DATE

SCHEDULED

DATE

HEARD

Tape number

INITIAL/NO.

OUTCOME

DISMISSED

HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney of Asst.

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD ☐ CD

Robert J. Jossen

791-0043

229

* Show last names and suffix numbers of other defendants on same indictment/information

Giordano-2, O'Brien-3, Riker-4.

DATE DOCUMENT NO.

PROCEEDINGS

EXCLUDABLE DELAY

7-22-76 Filed indictment.

7-29-76 Deft. not present, atty. not present. Court directs
 a N/G plea be entered. (0-5 days Trial) Case
 Case assigned to Judge Owen. 10 days for Motions.
 Conner, J.

8-23-76 Filed Gov'ts. Notice of Readiness for trial on or after 8/5/76.

8-23-76 Filed the following papers rec'd from Mag. Goettel. (Mag. #76-900)
 Docket Entry Sheet
 Unsecured PRB in the Amt. of \$2,500.
 Copy of Indictment.
 Disposition Sheet

BEST COPY AVAILABLE

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	DOCUMENT NO.	Interval Between (a)	Shall Date End Date (b)	Lip Date (c)	Total Days (d)
9-17-76	P.T.C. Held - Trial Date Set for Nov. 29th @ 10:00 A.M. Owen J.				
12-13-76	Jury Empaneled & sworn - case proceeds to trial as to all dfts.				
12-14-76	Trial Cont'd.				
12-15-76	" "				
12-16-76	" "				
12-17-76	" "				
12-20-76	" "				
12-21-76	" "				
12-22-76	" "				
12-23-76	" - Charge - Jury deliberations cont'd & concluded. Jury verdict as follows: Dft. Erm - Guilty all counts - Bail increased to \$10,000. PRB co-signed by wife...P.S.I. Ordered all guilty dfts. - Sentence for Feb. 3rd, 1977 @ 2:15 PM.....Owen J.				
12-27-76	Filed Unsecured PRB in the Amt. of \$10,000.00 Co-Signed by Wife Bonnie ERm.				
2-15-77	Filed One Envelope Ordered Sealed by the Court. Govt. Exh 3523(a) ID. So OrderedRichard Owen J. <i>placed in casher</i>				
2-15-77	Sealed Filed One Envelope Ordered /Dft. (Riker) Exh. D ID. - Ordered Sealed by Court.....Owen J. <i>placed in casher</i>				
2-15-77	Filed One Envelope Ordered Sealed. Ordered Sealed by Court. Courts Exhibit 1.....Owen J. <i>placed in casher</i>				
2-17-77	Filed Judgment & Commitment (Atty. George J. Koelzer Present) The dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of: On Count 1 - ONE(1) YEAR On Count 2- Imposition of Sentence is suspended & dft. is placed on Probation for a period of FIVE (5) YEARS, subject to the standing probation order of this Court. Bail is Cont'd pending appeal.....Owen Issued Commitment 2-18-77				
2-23-77	Filed Dfts. Notice of Appeal. (mailed copies & notice) - <i>noted</i>				

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 5

UNITED STATES OF AMERICA,

- v -

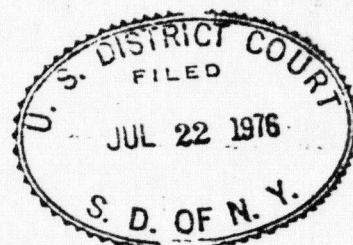
HAROLD STEPHEN ERM,
SALVATORE LOUIS GIORDANO, JR.,
CHARLES REILLY O'BRIEN, and
GEORGE FREDERICK RIKER,

Defendants.

INDICTMENT

76 Cr.

76 CRIM. 0669



COUNT ONE

The Grand Jury charges:

1. From on or about the 5th day of February, 1976, up to and including the date of the filing of this Indictment, in the Southern District of New York, HAROLD STEPHEN ERM, SALVATORE LOUIS GIORDANO, JR., CHARLES REILLY O'BRIEN, GEORGE FREDERICK RIKER, the defendants, and Michael Thomas Betz and Ronnie George Hamilton, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly, did combine, conspire, confederate and agree, together and with each other, and with others to the Grand Jury known and unknown, to commit offenses against the United States, to wit, to violate Section 659 of Title 18, United States Code.

2. It was a part of the conspiracy, and an object thereof that the defendants would and did embezzle, steal and unlawfully carry away and conceal from a motor-truck and other vehicle, with intent to convert to their own use, goods and chattels, the value of which exceeded \$100, which goods and chattels were moving as and were a part of an interstate shipment of freight.

3. It was further a part of the conspiracy and an object thereof that the defendants and co-conspirators would and did receive and have in their possession goods and chattels the value of which exceeded \$100, which goods and chattels were moving as and were a part of an interstate shipment of freight, knowing the same to have been embezzled and stolen.

OVERT ACTS

In furtherance of the conspiracy and in order to effectuate the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about the 5th day of February, 1976, GEROGE FREDERICK RIKER, the defendant, drove a 1975 Kenworth Tractor, Vehicle Identification Number 241859M and a refrigerated Dorsey Trailer, Vehicle Identification Number 115478, from North Bergen, New Jersey to 15 Fisher Avenue, Nanuet, New York.

2. On or about the 7th day of February, 1976, in the Southern District of New York, HAROLD STEPHEN ERM, GEORGE FREDERICK RIKER and Ronnie George Hamilton, the defendants and co-conspirator, unloaded part of the contents of the refrigerated Dorsey Trailer referred to in Overt Act 1, at 15 Fisher Avenue, Nanuet, New York.

3. On or about the 7th day of February, 1976, HAROLD STEPHEN ERM the defendant, drove away a flatbed truck loaded with canned Agar hams from the residence at 15 Fisher Avenue, Nanuet, New York.

4. On or about the 7th day of February, 1976, SALVATORE LOUIS GIORDANO, JR., and CHARLES REILLY O'BRIEN, the defendants, unloaded part of the contents of the refrigerated Dorsey Trailer referred to in Overt Act 1, at 15 Fisher Avenue, Nanuet, New York.

5. On or about the 8th day of February, 1976, HAROLD STEPHEN ERM, SALVATORE LOUIS GIORDANO, JR., CHARLES REILLY O'BRIEN, Ronnie George Hamilton, Michael Thomas Betz, and GEORGE FREDERICK RIKER, the defendants and co-conspirators, unloaded part of the contents of the refrigerated Dorsey Trailer, referred to in Overt Act 1, at 15 Fisher Avenue, Nanuet, New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

From on or about the 5th day of February, 1976, up to and including the 9th day of February, 1976, HAROLD STEPHEN ERM, SALVATORE LOUIS GIORDANO, JR., CHARLES REILLY O'BRIEN, and GEORGE FREDERICK RIKER, the defendants, unlawfully, wilfully and knowingly, did receive and have in their possession certain goods and chattels of a value greater than \$100, namely, approximately 75 cartons of canned Agar hams and 11 pallets of fresh pork, knowing the same to have been embezzled and stolen, said goods and chattels having been embezzled, stolen and unlawfully taken and carried away from a motortruck and vehicle owned by Dick Bulso, Canton, Ohio and operated by Werner Continental, Chicago, Illinois, while said goods and chattels were moving as, were a part of, and constituted an interstate shipment of freight, express and property from Chicago, Illinois to North Bergen, New Jersey.

(Title 18 United States Code, Sections 659 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 5th day of February, 1976, in the Southern District of New York and elsewhere, GEORGE FREDERICK RIKER, the defendant, unlawfully, wilfully and knowingly did transport in interstate commerce a motor vehicle, namely, a 1975 Kenworth Tractor, Vehicle Identification Number 241859M and a refrigerated Dorsey Trailer, Vehicle Identification Number 115478, knowing the same to have been stolen.

(Title 18, United States Code, Section 2312.)

COUNT FOUR

The Grand Jury further charges:

On or about the 5th day of February, 1976, in the Southern District of New York and elsewhere, GEORGE FREDERICK RIKER, the defendant, unlawfully, wilfully and knowingly did receive and conceal the motor vehicle described in Count Three, which had been moving as, was a part of and which constituted interstate commerce, knowing the same to have been stolen.

(Title 18, United States Code, Section 2313.)

Joseph Feldman
FOREMAN

Robert B. Fiske Jr.
ROBERT B. FISKE, JR.
United States Attorney

OFFENDANT

DOCKET NO. 100-10000 (100)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
2 3 77

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

CARL BENSTEIN, esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☒ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully did conspire with others to steal and carry away from a motortruck goods, the value of which exceeded \$100.00 which was moving as and was part of an interstate shipment of freight and did have in their possession goods, knowing the same to have been embezzled and stolen and unlawfully transport in interstate commerce and conceal a motor vehicle knowing the same to have been stolen.

(Title 18, USC sec 859 and 2) (Title 18, USC Sec 2312 and 2313) 70

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared, to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS on EACH of Counts 1, 2, 3 and 4, to run CONCURRENTLY to each other.

RECEIVED
ON
PROBATION
ORDER

all is continued pending appeal.

SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT
RECOMMEN-
DATION

MICROFILM

FEB 7 1977

9

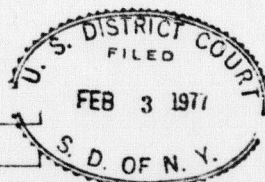
It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
U.S. District Judge
U.S. Magistrate

[Signature]

Date

2-3-77



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SAV.Erm
12/23/76
Charge

1 lhrpl

Charge of the Court

1677

2 (Jury present.)

3 THE COURT: Mr. Foreman, ladies and gentlemen
4 of the jury:

5 We are at the point in this trial where you are
6 soon to undertake your final function as jurors. It is
7 here, as I am sure I said to you at the outset of this
8 case, that you are to perform what I regard as one of
9 the most valuable duties and obligations of citizenship
10 in this country, which is to act as ministers of justice
11 and to determine in accordance with the instructions that
12 I will give you and in accordance with the evidence that
13 you have heard, what are the facts in this case, what happened.

14 You are to do this and you are to discharge
15 your duties with complete fairness, complete impartiality,
16 and as I said when you were selected, you are to do it
17 without any bias or prejudice for or against the government
18 or for or against any of the defendants, Mr. Erm, Mr. O'Brien,
19 Mr. Giordano or Mr. Riker, as parties to this case.

20 This is an important case obviously to all
21 parties, government and defendants, as well as to the
22 public at large. The fact that the government is a party
23 here entitles it to no greater consideration than that
24 given to any other party or in any other case.

25 By the same token, it is entitled to no less consideration.

1 lhrp2

2 All parties, whether it is the government,
3 an individual, a corporation or whatever, all stand alike
4 and as equals before the Bar of justice.

5 In passing on the fact issues here, which is
6 your role, you are the sole and exclusive judges of those
7 facts. That is not my province, that is your province.
8 You determine the weight of evidence, you appraise the
9 credibility or believability of the witnesses you have
10 heard, you draw such reasonable inferences from the
11 evidence as you think are warranted, you resolve such
12 conflicts as you may find exist in the evidence.

13 In doing this I will later give you some thoughts
14 as to how you can be assisted in determining these issues
15 and determining any questions of credibility or believ-
16 ability that you may find.

17 My final function as the Judge is to instruct
18 you as to the law, and I charge you that it is your duty
19 to accept these instructions of mine and to apply them
20 to the facts as you may find them.

21 With respect to any fact matter, it is your
22 recollection and yours alone that governs what the testimony
23 was. I think I may have told you some time earlier in
24 this case or elsewhere that anything that any attorney has
25 said with respect to any testimony, whether during the trial,

1 lhrp3

2 in a question, in an argument, in summation or anywhere else,
3 is not to be substituted for your own recollection of
4 the evidence. So, too, anything that I may have said
5 or may have referred to during the course of the trial
6 with regard to any matter in evidence is not to be taken
7 in place of your own recollection of what that testimony
8 was. If you have a concern that your recollection is not
9 sufficient for your purposes with regard to any testimony,
10 you may have testimony reread to you, if you feel that is
11 necessary.

12 If you wish to consider any exhibit, you have
13 only to ask for it and it will be made available to you for
14 your consideration.

15 I want to say as a preliminary matter that
16 in hearing and applying my charge on the law, you are
17 to treat my charge as an entirety. It goes on for perhaps
18 the better part of an hour, and you are to consider it and
19 apply it as a whole and not to concentrate on any particular
20 part of it in the course of your deliberations.

21 Let me turn to a few preliminary things.

22 The indictment in this case contains four counts
23 and four defendants are on trial before you. You are to
24 pay attention only to the evidence concerning these four
25 defendants.

1 lhrp4

2 In the determination of guilt, you must bear
3 in mind that guilt is a personal thing. The guilt or in-
4 nocence of any defendant on trial before you must be
5 determined separately with respect to him, solely on the
6 evidence presented against him or the lack of evidence,
7 as the case may be, and not on any evidence that is intro-
8 duced against anybody else.

9 This indictment, as I said to you at the out-
10 set, is only a number of pieces of paper. It is merely a
11 charge. It is not evidence of anything, it is not proof
12 of a defendant's guilt and no weight whatsoever is to be
13 given to the fact that an indictment has been returned here.

14 Each defendant has pleaded not guilty to the
15 charges that are typed on these pieces of paper, and, thus,
16 the government at all times throughout the course of this
17 trial has had and still has and will have to the end the
18 burden of proving the charges against each defendant beyond
19 a reasonable doubt.

20 A defendant does not have to prove his innocence.
21 A defendant does not have to prove anything. On the contrary,
22 a defendant is presumed to be innocent of the charges con-
23 tained in this indictment. This presumption of innocence,
24 as you heard me say before, was in his favor at the start
of the trial, it continues in his favor throughout the

1 lhrp5

2 testimony taking, it is in his favor even as I am now
3 instructing you at this very moment, and it remains in his
4 favor during the course of your deliberations in the jury
5 room.

6 The presumption of innocence is removed only
7 if and only when you are satisfied that the government has
8 sustained its burden of proving the guilt of a defendant
9 beyond a reasonable doubt. At that point the presumption
10 of innocence would fall away.

11 The question that comes up is, what is a reason-
12 able doubt? The words, I am sure you can see, practically
13 define themselves. It is a doubt founded upon reason and
14 arising out of the evidence in the case or the lack of
15 evidence, as the case may be. It is a doubt which a reason-
16 able person has after carefully weighing all the evidence.

17 Reasonable doubt is a doubt which appeals to
18 your reason, your judgment, your common sense and
19 your experience. A reasonable doubt is not caprice, whim,
20 speculation, guesswork, conjecture or suspicion. Reasonable
21 doubt is not an excuse to avoid the performance of an un-
22 pleasant duty. It is not sympathy for a defendant.

23 If after a fair and impartial consideration
24 of all the evidence you can candidly and honestly say that
25 you are not satisfied of the guilt of a defendant, that you

1 lhrp6

2 do not have an abiding conviction of his guilt, then, in
3 sum, if you have such a doubt as would cause you as a
4 prudent person to hesitate before acting in matters of
5 importance to yourself, then you have a reasonable doubt.

6 In that circumstance it is your duty to acquit.

7 If on the other hand, after such impartial and
8 fair consideration of all the evidence you candidly and
9 honestly say that you do have an abiding conviction of a
10 defendant's guilt, such a conviction as you would be willing
11 to act upon in important and weighty matters in the
12 personal affairs of your own life, then you have no reason-
13 able doubt, and under such circumstances, it is your duty
14 to convict.

15 [One final word on this subject. Reasonable
16 doubt does not mean a positive certainty or beyond all
17 possible doubt. If that were the rule, few persons, however
18 guilty, would ever be convicted. It is practically im-
19 possible for a person to be absolutely and completely
20 convinced of any controverted fact which by its nature
21 cannot be proved by mathematical certainty.]

22 Therefore, the law in a criminal case is that
23 it is sufficient that the guilt of a defendant be established
24 beyond a reasonable doubt, not beyond all possible doubt.

25 As I have said, the indictment in this case

1 lhrp7

2 against Mr. Erm, Mr. Giordano, Mr. O'Brien and Mr. Riker
3 contains four counts, and each count charges a separate
4 crime.

5 I am now going to read the indictment to you,
6 and I may say that I am going to send the indictment with
7 you to the jury room so that you may have it before you
8 while you are considering the various matters you must
9 consider.

10 "Count One: From on or about the 5th day of
11 February, 1976, up to and including the date of the filing
12 of this indictment" -- Mr. Jossen, may I have a date?

13 MR. JOSSEN: Yes, your Honor, if you will allow
14 me a moment.

15 (Pause.)

16 MR. JOSSEN: July 22, 1976.

17 THE COURT: -- "up to the date of the filing
18 of this indictment, July 22, 1976, in the Southern District
19 of New York" -- and let's get that little phrase into
20 proper perspective.

21 The Southern District of New York is a federal
22 geographic district which includes Manhattan, the Bronx
23 and counties running more or less almost up to Albany.

24 I charge you that Rockland County which has lo-
25 cated within it Nanuet is within the Southern District of

1 lhrp8

2 New York.

3 -- "in the Southern District of New York,
4 Harold Stephen Erm, Salvatore Louis Giordano, Jr., Charles
5 Reilly O'Brien and George Frederick Riker, the defendants,
6 and Michael Thomas Betz and Ronnie George Hamilton, named
7 herein as coconspirators but not as defendants, unlawfully,
8 willfully and knowingly did combine, conspire, confederate
9 and agree together and with each other and with others,
10 to the Grand Jury known and unknown, to commit offenses
11 against the United States, to wit, to violate Section 659
12 of Title 18, United States Code."

13 I will give you the pertinent provisions of that
14 later on.

15 "Two: It was part of the conspiracy and an
16 object thereof that the defendants would and did steal
17 and unlawfully carry away and conceal from a motor truck
18 and other vehicle with intent to convert to their own use
19 goods and chattels, the value of which exceeded \$100, which
20 goods and chattels were moving as and were a part of an
21 interstate shipment of freight.

22 "Three: It was further a part of the conspiracy
23 and an object thereof that the defendants and coconspirators
24 would and did receive and have in their possession goods
25 and chattels, the value of which exceeded \$100, which goods

1 lhrp9

2 and chattels were moving as and were a part of an interstate
3 shipment of freight, knowing the same to have been stolen.

4 "Count Two: From on or about the 5th day of
5 February, 1976, up to and including the 9th day of February,
6 1976, Harold Erm, Salvatore Giordano, Charles O'Brien and
7 George Piker, the defendants, unlawfully, willfully and
8 knowingly did receive and have in the possession certain
9 goods and chattels of a value greater than \$100, namely
10 approximately 75 cartons of canned Agar hams and 11 pallets
11 of fresh pork, knowing the same to have been stolen, said
12 goods and chattels, having been stolen and unlawfully taken
13 and carried away from a motor truck and vehicle owned by
14 Dick Bulso, Canton, Ohio, and operated by Werner Continental,
15 Chicago, Illinois, while said goods and chattels were moving
16 as, were a part of and constituted an interstate shipment
17 of freight, express and property from Chicago, Illinois,
18 to North Bergen, New Jersey.

19 "Count Three: On or about the 5th day of
20 February, 1976, in the Southern District of New York
21 and elsewhere, George Riker, the defendant, unlawfully,
22 willfully and knowingly did transport in interstate
23 commerce a motor vehicle, namely a 1975 Kenworth tractor,
24 vehicle identification No. 241859M and a refrigerated
25 Dorsey trailer, vehicle identification No. 115378,

1 lhrp10

2 knowing the same to have been stolen.

3 "Count Four: On or about the 5th day of
4 February, 1976, in the Southern District of New York and
5 elsewhere, George Riker, the defendant, unlawfully,
6 willfully and knowingly did receive and conceal the
7 motor vehicle described in Count Three which had been
8 moving as and was a part of and which constituted inter-
9 state commerce, knowing the same to have been stolen."

10 Let us turn to the specific charges against
11 the defendants.

12 The first count charges a conspiracy. It
13 charges that the defendants Erm, O'Brien, Giordano and
14 Riker, together with each other and with others both
15 known and unknown to the Grand Jury, conspired to violate
16 federal laws dealing with the theft and possession of
17 goods which were moving in interstate commerce and
18 stolen from interstate commerce.

19 I shall call this count the conspiracy count.

20 The second count charges each of the defendants
21 named in the indictment with receiving and possessing
22 goods which were stolen from interstate shipment of freight,
23 knowing the same to have been stolen.

24 The third count charges defendant Riker
25 with transporting in interstate commerce a stolen truck.

1 lhrp11

2 The fourth count charges defendant Riker
3 with receiving and concealing a stolen truck which had
4 been moving in interstate commerce.

5 The second, third and fourth counts are
6 called substantive counts, and the first count is called
7 a conspiracy count.

8 A conspiracy to commit a crime is an entirely
9 separate and distinct offense from the substantive crime wh
10 which is the object of the conspiracy.

11 A conspiracy, sometimes referred to as a
12 partnership in crime because it involves collective or
13 organized action, presents a greater potential threat
14 to the public interest than the elicit activity of a single
15 individual. It was for these and other reasons that
16 Congress made conspiracy an entirely separate, distinct
17 and different violation from the law or laws which might
18 be the objective of the conspiracy.

19 The essence of a criminal conspiracy is an
20 agreement or understanding to violate another law or
21 laws. Thus, if a conspiracy exists, even if it should
22 fail of its purpose, it is still punishable as a crime.
23 Consequently, in a conspiracy charge there is no need
24 for the government to go prove an actual violation of federal
25

1 hrpl2

2 law, although here obviously in this case the government
3 contends that it has proved an actual violation as well.
4 That is, the government contends it has not only proved
5 defendants' agreement to steal and carry away goods moving
6 as part of an interstate shipment and to convert the
7 contents of this vehicle to their own use, but also it
8 contends that it has proved the actual receipt and
9 possession of the meat stolen from an interstate shipment,
10 knowing it to have been stolen.

11 Since the essential elements for conviction
12 of the substantive count applicable to all four defendants,
13 that is Count Two of this indictment, is somewhat dif-
14 ferent from the essential elements of the crime of con-
15 spiracy, I believe it will be somewhat clearer for you
16 if we first discuss substantive Count Two. I will then
17 go back to the conspiracy count, which is Count No. One.

18 Count No. Two alleges a violation of
19 Section 659 of Title 18 of the United States Code, and
20 that provides in pertinent part as follows. I am going
21 to read you the statutes.

22 "Whoever steals or unlawfully takes, carries
23 away or conceals or by fraud or deception obtains from
24 any motor truck or other vehicle with intent to convert
25 to his own use any goods or chattels moving as or which

1 lhrp13

2 constitute an interstate shipment of freight, express
3 or other property, is guilty of a crime."

4 The statute further provides: "Whoever buys
5 or receives or has in his possession any such goods or
6 chattels, knowing the same to have been stolen, is guilty
7 of a crime."

8 Count Two charges Erm, Giordano, O'Brien and
9 Riker with the illegal possession of such stolen goods.

10 In order to find a defendant guilty of the
11 crime charged in Count Two, and again I point out to you
12 you must consider each defendant separately, as I
13 earlier instructed you, because guilt is personal, as I
14 earlier instructed you, in order to find a defendant
15 guilty of the crime charged in Count Two, you must find
16 each of the following elements, beyond a reasonable doubt:

17 First, that the cartons of canned Agar ham
18 and the pallets of fresh pork were stolen from the Werner
19 Continental tractor-trailer;

20 Second, that at the time of the theft the
21 meat was part of an interstate shipment, that is that the
22 meats were on their way from Illinois but had not yet
23 arrived at their point of delivery in New Jersey;

24 Third, that at some time on or about February 5th
25 through 9th in the Southern District of New York, the

1 lhrpl4

2 defendant you are considering unlawfully, willfully and
3 knowingly had the meat or some of it in his possession,
4 knowingly it to have been stolen.

5 If you find each of these elements beyond a
6 reasonable doubt, then that defendant is guilty of the
7 crime charged in Count Two.

8 If you find a defendant guilty under the
9 statute as I will further explain it to you, you must
10 then determine whether beyond a reasonable doubt the
11 stolen goods possessed by the defendant you are consider-
12 ing had a value in excess of \$100 or had a value of less
13 then \$100.

14 I am going to give you a verdict sheet to
15 assist you in keeping track of what your duties are in
16 these specific end results.

17 Let me read these again to you so you have
18 them clearly in mind.

19 First, that the cartons of canned Agar hams
20 and the pallets of fresh pork were stolen from the Werner
21 Continental tractor-trailer;

22 Second, that at the time of the theft the
23 meat was part of an interstate shipment, that is that
24 it was on its way from Illinois but had not yet arrived
25 at its point of delivery in New Jersey;

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2 Third, that at some time in or about February 5th
3 through 9, 1976, in the Southern District of New York,
4 the defendant you are considering unlawfully, willfully
5 and knowingly had the meat or some of it in his possession,
6 knowing it to have been stolen.

7 Let's define some of these terms. I am
8 sure we all have a pretty good layman's idea of what
9 the word "stolen" means, but we must be precise in
10 this case.

11 To steal means to obtain goods belonging to
12 another with intent to deprive the owner of the rights
13 and benefits of ownership.

14 As to the theft being of an interstate shipment,
15 I charge you that goods intended by a shipper to be shipped
16 to another state become a part of interstate commerce
17 as soon as those goods have left the shipper's possession,
18 in this case, if you were to find, when they left Chicago,
19 and are in interstate commerce and remain in interstate
20 commerce while they are in the possession of a carrier
21 or a trucking company which is taking them on the journey.
22 This means that the government, to prevail on the sub-
23 stantive count, must prove that the cartons in question
24 were in fact being sent by a shipper in Illinois with
25 the intention that they be transported across state lines

1 lhrpl6

2 to a delivery point, somebody who was to receive the
3 meat from the trucker, in New Jersey.

4 However, I want to point out to you that
5 the government is not required to prove that the defendant
6 knew that the goods that were stolen were stolen from
7 such an interstate shipment. In other words, the de-
8 fendant need not know that the shipment was crossing
9 state lines in the course of its delivery. It is sufficient
10 on this element that you find the defendant you are con-
11 sidering knew the goods merely to have been stolen. In
12 other words, you must find that the goods were in an
13 interstate shipment, and, second, that the defendant knew
14 that the goods were stolen. You do not need, as I have
15 said, to find that a defendant actually knew they were
16 moving as an interstate shipment.

17 As to the word "possession," I charge you
18 that the canned hams and the pork were in a defendant's
19 possession if you find that the defendant you are con-
20 sidering had them in his power or control.

21 Obviously, a truckload or part of a truckload
22 of cartons of canned hams or pallets of fresh meat cannot
23 be taken by a person and put in his pocket or held in
24 his hand. But it is in his possession, nevertheless,
25 if a carton or cartons or pallet or pallets are under

1 lh rpl7

2 his command or under his control.

3 The government contends in this case that
4 each defendant had possession of the stolen meat in that
5 each controlled the location of the tractor-trailer or
6 physically removed the meat from the tractor-trailer or
7 ultimately carried the meat away from the tractor-trailer
8 to dispose of it as they pleased.

9 If you find this to be the fact as to any
10 defendant, then that defendant who had such control or
11 connection with the meat, possessed the meat for purposes
12 of this case.

13 Possession by a defendant, I want to charge
14 you, also can be either actual or constructive.
15 Constructive possession means that although the goods
16 are in the physical possession of somebody else, if a
17 defendant knowingly has the power to exercise control
18 over them or over their distribution or what is done with
19 them, then that defendant has constructive possession
20 over the goods.

21 As to the terms "knowingly and willfully,"
22 should it become appropriate for you to apply them, an act
23 is done knowingly if it is done voluntarily and purposely,
24 and not because of mistake, accident, mere negligence
25 or some other innocent reason.

1 lhrpl8

2 An act is done willfully if you find that
3 it is done knowingly and deliberately.

4 I want to charge you as to an inference that
5 is applicable here should you so find.

6 Possession of recently stolen property, if
7 not satisfactorily explained, is ordinarily a circumstance
8 from which you may reasonably draw the inference and
9 find in the light of the surrounding circumstances shown
10 by the evidence in the case that the person in possession
11 knew the property had been stolen.

12 However, you are never required to make
13 this inference. It is the exclusive province of you,
14 the jury, to determine whether the facts and circumstances
15 shown by the evidence in this case warrant any inference
16 which the law permits you to draw from the possession of
17 recently stolen property.

18 The term "recently" is a relative term and
19 has no fixed meaning. Whether property may be considered
20 as recently stolen depends upon the nature of the property
21 and all the facts and circumstances shown by the evidence
22 in the case. The longer the period of time since the
23 theft, the more doubtful becomes the inference which may
24 reasonably be drawn from unexplained possession.

25 If you should find beyond a reasonable doubt

lhrpl9

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2 from the evidence in the case that the canned hams and
3 fresh pork described in the charges were stolen and
4 that while recently stolen they were in the possession
5 of a defendant whose guilt or innocence you are considering,,
6 you would ordinarily be justified in drawing from those
7 facts the inference that the goods were possessed by the
8 accused with knowledge that it was stolen property,
9 unless such possession is explained by facts and circum-
10 stances in this case which are in some way consistent
11 with the defendants innocence.

12 In considering whether possession of recently
13 stolen property has been satisfactorily explained, I
14 charge you, as I will more fully later on, but I charge
15 you at this point that in the exercise of constitutional
16 rights, a defendant need not take the witness stand and
17 testify and no adverse inference is to be drawn therefrom,
18 as I shall more fully charge you later on.

19 Possession may be explained satisfactorily
20 through other circumstances, other evidence, independent
21 of any testimony of the accused.

22 Finally, as to value, you are instructed that
23 value in the context we are talking about here, means
24 the cost price, whether wholesale or retail, whichever
25 is greatest. You need not find that each can or carton

1 lhrp20

2 of ham or each piece or pallet of fresh pork had a value
3 in excess of \$100 to conclude that the value of the meat
4 possessed, if any, by each of the defendants had a value
5 that exceeded \$100.

6 The question that you must answer for each
7 individual defendant, assuming that you have found that
8 the defendant under consideration was in fact guilty of
9 possessing stolen meat, is whether the total value of
10 the meat possessed by that defendant exceeded \$100.

11 At this point I want to charge you on what
12 we lawyers call the doctrine of aiding and abetting.

13 It is not necessary for the government to show
14 that the defendant you are considering physically committed
15 the crime alleged in the indictment.

16 Section 2 of Title 18 of the United States
17 Code provides that a person who aids and abets another
18 to commit an offense is just as guilty of that offense
19 as if he committed it himself.

20 Accordingly, you may find a defendant guilty
21 as charged, if you find beyond a reasonable doubt that
22 someone else committed the offense and that the defendant
23 you are considering aided and abetted that other person
24 or persons.

25 To determine whether a defendant aided and

1 lhrp21

2 abetted in the commission of an offense, you ask your-
3 self these questions, among others that I am sure
4 may occur to you:

5 Did that defendant associate himself with
6 the venture? Did he participate in it as if in something
7 he wished to bring about? Did he seek by his action to
8 make it succeed?

9 If you find that he did, then you may find
10 that he is an aider and abettor.

11 Let's go back to the conspiracy count, Count
12 One, which charges all four defendants in essence with
13 conspiring to steal, possess and carry away merchandise
14 from an interstate shipment, conspiring to do that.

15 Title 18, United States Code, Section 371,
16 provides as follows:

17 "If two or more persons conspire to commit
18 any offense against the United States and one or more of
19 such persons does an act to effect the object of the
20 conspiracy, each is guilty of a crime."

21 Let me read that to you again.

22 "If two or more persons conspire to commit
23 any offense against the United States and one or more of
24 such persons does an act to effect the object of the
25 conspiracy, each is guilty of a crime."

1 lhrp22

2 I want it to be perfectly clear here that the
3 conspiracy we are talking about only involves the meat
4 that was in the trailer. It does not involve the tractor
5 and it does not involve the trailer itself. This conspiracy
6 involves the meat.

7 You can see that, I am sure as you will, when
8 you look at the indictment when you retire to consider
9 your verdict in this case.

10 In order to find a defendant guilty of con-
11 spiracy as his charged in the first count of the indict-
12 ment, you must find each of the following elements beyond
13 a reasonable doubt:

14 First, you must find the existence of the
15 conspiracy charged. You have got to find that there was
16 a conspiracy as charged and you must find that at some
17 time during the period from on or about February 5, 1976,
18 up until July 22, 1976, the date of the filing of the
19 indictment, you must find that an agreement existed
20 between at least two of those charged to violate federal
21 laws dealing with theft and possession of goods which
22 were moving in interstate commerce and stolen from inter-
23 state commerce;

24 Second, you must find that the defendant you
25 are considering knowingly associated himself with this

1 lhrp23

2 conspiracy or agreement and participated in it;

3 Third, that one of the coconspirators knowingly
4 committed at least one of the overt acts, which I will
5 explain to you in a few minutes, which are set forth in
6 the indictment, at or about the time and place charged;

7 And, fourth, that either the agreement was
8 formed in the Southern District of New York or an overt
9 act occurred in the Southern District of New York.

10 Let me just repeat those for you but in a
11 much more shortened form.

12 You are going to have to find that there was
13 the existence of the conspiracy charged, you have to
14 find that the defendant you are considering knowingly
15 associated himself with this conspiracy; third, that
16 one of the coconspirators committed at least one of the
17 overt acts that is charged, and, fourth, that the agree-
18 ment was either formed or an overt act occurred in the
19 Southern District of New York.

20 Let us get to the various elements about
21 which I have just spoken to you.

22 A conspiracy is an agreement, an understanding
23 by two or more persons to accomplish a criminal or unlawful
24 act. To establish this, the government is not required
25 to show that two or more persons sat around a table and

1 lhrp24

2 entered into a solemn pact orally or in writing stating
3 they have formed a conspiracy or to set forth the details
4 or the means by which it is to be achieved. That is not
5 required.

6 Your common sense will tell you, I am sure,
7 that when persons in fact undertake to enter into a criminal
8 conspiracy, much is left to the unexpressed understanding.

9 What the evidence must show in order to establish
10 that a conspiracy existed is that the members in some
11 way or manner, expressly or by implication, came to a
12 common understanding to violate the law or to accomplish
13 an unlawful plan.

14 To determine whether there has been such a
15 conspiracy, you may judge the facts and the conduct of
16 the alleged coconspirators which are done to carry out
17 an apparent criminal purpose. The old adage, "Actions
18 speak louder than words" is obviously applicable here.
19 Often, the only evidence available is that of the dis-
20 connected acts or conduct on the part of the individuals
21 charged, which acts or conduct, however, when taken by
22 you together and considered as a whole permit the inference
23 that the conspiracy existed as conclusively as if by
24 direct proof. In short, the items of evidence are not to
25 be viewed in isolation, but together with each other.

1 lhrp25

2 You are to view thus the totality of all the
3 evidence.

4 I have mentioned previously that a conspiracy
5 is sometimes called a partnership for criminal purposes
6 in which each member of it becomes an agent for each
7 other member. Each person in a conspiracy may perform
8 separate and distinct acts at different times and at
9 different places. All the conspirators need not be ac-
10 quainted with each other. They may not have previously
11 associated together. One of the defendants may know
12 only one other member of the conspiracy. If he enters
13 into an unlawful agreement with that other member of the
14 conspiracy, however, he becomes a party to the conspiracy.
15 One conspirator may play a major role while another
16 plays a minor role. Thus, the guilt of one is not governed
17 by the extent, the duration or whether he played a greater
18 or a lesser role.

19 In other words, it is not required that a
20 person be a member of a conspiracy from the very start.
21 He may join it at some point during its progress and
22 be held responsible for all that has been done to
23 further it after he joined and that may be thereafter
24 done during its existence while he remains a member.

25 In other words, every coconspirator is fully

1 lhrp 26.

2 responsible for whatever another coconspirator does or
3 says in furtherance of the conspiracy, whether he knows
4 about it or not, whether he specifically approves of it
5 or not, that is as long as you have found the defendant
6 you are considering to be a member of the conspiracy.

7 So, ladies and gentlemen, and I am coming at
8 the same subject obviously from a number of different
9 directions, but you must determine whether the proof
10 here has established the existence of the conspiracy or
11 the agreement that is charged.

12 In deciding this, you must consider all the
13 evidence with respect to the conduct, acts and declarations
14 of each of the allege coconspirators and such inferences
15 as you may reasonably draw from that. It is sufficient
16 to establish the existence of the conspiracy if from
17 the proof of all the relevant facts and circumstances
18 you find beyond a reasonable doubt that the minds of at
19 least two alleged coconspirators met in an understanding
20 way to accomplish by the means charged the objects of the
21 conspiracy as alleged in the indictment. If you do conclude
22 that the conspiracy as charged did exist, you must then
23 determine whether either Mr. Erm or Mr. Giordano or Mr. O'Brien
24 or Mr. Riker became members of it.

25 A defendant's participation in the conspiracy,

1 lhrp27

2 if you find that one existed, must be established by
3 the independent evidence of his own acts, conduct and
4 statements, as well as those of the other alleged coconspira-
5 tors and the reasonable inferences to be drawn from them.

6 To find a defendant a member of the conspiracy,
7 you must upon all the evidence be satisfied beyond a rea-
8 sonable doubt that the defendant was aware of its unlaw-
9 ful purpose, that he was a willing participant with intent
10 to advance its purposes and that he joined it with a
11 specific criminal intent, that is with a deliberate purpose
12 to violate the law.

13 Thus, in determining whether a defendant
14 became a member of the conspiracy, you must determine
15 not only whether he participated in it, but whether he
16 did so with knowledge of its unlawful purpose. Did he
17 join it with awareness of at least some of the basic
18 aims and purposes?

19 Knowledge is a matter of inference, from
20 facts proved. Medical science obviously has not devised
21 a way to permit us to go into a man's mind and know with
22 certainty what he knew or thought at some time in the
23 past. However, you do have before you testimony of certain
24 acts on the part of these defendants from which, if you
25 credit that testimony, from which the government contends

1 lhrp28

2 that this can be gleaned, the government thereupon contends
3 it has shown knowledge on the part of each defendant
4 of the unlawful purpose of this conspiracy.

5 It is not necessary that a defendant be fully
6 informed as to the details of the scope of the conspiracy
7 in order to justify your conclusion of knowledge on his
8 part.

9 I charge you that in this connection you may
10 not draw an adverse inference of participation in this
11 conspiracy from the mere association or friendship of
12 a particular defendant and any other person. Mere
13 association with a coconspirator, even coupled with know-
14 ledge that a conspiracy exists, is not sufficient by itself
15 to convict.

16 Thus, mere presence at the scene of an event
17 allegedly connected with the conspiracy, even knowing
18 that a crime is being committed, is not sufficient to
19 establish that a defendant aided or abetted or participated
20 in the crime, unless you also find beyond a reasonable
21 doubt that the defendant was a participant and not merely
22 a knowing spectator.

23 Once a person is found to be a member of a
24 conspiracy, that person is presumed to continue his member-
25 ship until its termination, unless there is affirmative

1 lhrp29

2 proof offered of withdrawal or disassociation.

3 The existence of a conspiracy may be established
4 and one's membership in it may be established by either
5 direct or circumstantial evidence.

6 Ladies and gentlemen, direct evidence is
7 where a witness testifies to what he saw, heard or
8 observed, what he knows of his own knowledge, that which
9 came to him through the use of his own senses. That's
10 direct evidence.

11 Circumstantial evidence, on the other hand,
12 is where facts are established from other facts from
13 which you can in terms of common experience logically con-
14 clude that the facts sought to be established do exist.
15 That is somewhat convoluted, but let me give you an ex-
16 ample.

17 Let's assume that when you came into the
18 courtroom the sun was shining but the blinds were drawn
19 so that you were unable to see out and it had been a
20 clear, dry day when you entered the building. The fact
21 that it was a dry and clear day when you entered, that
22 is direct evidence, because you observed that, you looked
23 at the heavens and you saw what the day was like. But
24 let us assume that at the close of my charge a man walked
25 in with an umbrella, came in through this door over here,

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2 and shook water off the umbrella, and another man came
3 in and was wearing a raincoat with spots of water all
4 over the shoulders. You could conclude from the umbrella
5 and the water on the shoulders that since the time you
6 came into the courtroom, it had stopped being a nice
7 day and it had started to rain. It is as simple as that.

8 You may logically infer from what you saw,
9 which is the direct evidence, the raincoat and the umbrella,
10 the next fact, which is that it is now raining outside.
11 That's all there is to circumstantial evidence.

12 You may infer one fact which logically flows
13 from another fact which has been prove before you.

14 I charge you that circumstantial evidence,
15 if you believe it, is of no less value than direct evidence.
16 In either case, whether the evidence is circumstantial
17 or whether it is direct, you must be convinced beyond a
18 reasonable doubt of the guilt of any defendant on any
19 count and on each element of the count. If you find the
20 government has sustained the elements of a defendant's
21 knowing participation in a conspiracy, then we reach
22 the question of the next element, which is that you must
23 find that an overt act was done to effect the object of
24 the conspiracy and was committed by at least one of the
25 coconspirators after an unlawful agreement was made.

lhrp31

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2 Let us get down to the possibly mysterious
3 words "overt act."

4 Overt act, o-v-e-r-t, is the way it is spelled,
5 is a long-honored legal word which means nothing more
6 than some step or action or conduct which is taken to
7 achieve, accomplish or further the objectives of the
8 conspiracy, thus showing that the conspiracy is more
9 than mere talk.

10 The purpose of requiring the proof of an
11 overt act is that while parties might conspire and agree
12 to violate the law, they may change their minds before
13 they do anything about it and do nothing to carry it into
14 effect. If that is so, that would not constitute an
15 offense.

16 The overt act which the government must prove
17 need not be a criminal act nor must the government prove
18 all of the overt acts which are alleged in the indictment.

19 Proof of any one overt act by any member of
20 the conspiracy is sufficient if you find beyond a reason-
21 able doubt that it has been committed.

22 Let me read to you the overt acts listed in
23 the indictment.

24 "In furtherance of the conspiracy and in order
25 to effectuate the objects thereof, the following overt

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2 acts, among others, were committed in the Southern
3 District of New York and elsewhere.

4 "(1) On or about the 5th day of February,
5 1976, George Riker drove a 1975 Kenworth tractor and a
6 refrigerated Dorsey trailer from North Bergen, New Jersey,
7 to 15 Fisher Avenue, Nanuet, New York.

8 "(2) On or about the 7th day of February,
9 1976, in the Southern District of New York Harold Erm,
10 George Riker and Ronnie Hamilton, the defendants and
11 coconspirator, unloaded part of the contents of the
12 refrigerated Dorsey trailer referred to in Overt Act One
13 at 15 Fisher Avenue, Nanuet, New York.

14 "(3) On or about the 7th day of February,
15 1976, Harold Erm drove away a flatbed truck loaded with
16 canned Agar hams from the residence of 15 Fisher Avenue,
17 Nanuet, New York.

18 "(4) On or about the 7th day of February,
19 1976, Salvatore Giordano and Charles O'Brien, defendants,
20 unloaded part of the contents of the refrigerated Dorsey
21 trailer referred to in Overt Act One at 15 Fisher Avenue,
22 Nanuet, New York.

23 "(5) On or about the 8th day of February, 1976,
24 Harold Erm, Salvatore Giordano, Charles O'Brien, Ronnie
25 Hamilton, Michael Betz and George Riker, the defendants
and coconspirators, unloaded part of the contents of the

1 lhrp33
2 refrigerated Dorsey trailer at 15 Fisher Avenue, Nanuet,
3 New York."

4 Those are the overt acts that are charged.
5 You must find, as I have said, that one of the coconspirators
6 knowingly committed at least one of the overt acts set
7 forth in the indictment at or about the time and place
8 alleged.

9 It is not necessary, as you will see following
10 what I earlier said, that the government must prove that
11 each member of the conspiracy committed or participated
12 in an overt act, since, as I told you before, the act of
13 any member done in furtherance of the conspiracy becomes
14 the act of all the other members.

15 The overt act need not have occurred at the
16 precise times and precise places as alleged. So, too,
17 while the indictment charges the conspiracy began on or
18 about February 5th and continued up until July 22, 1976,
19 although the testimony at this trial obviously concerned
20 itself primarily with the events taking place from
21 February 5th through February 11th, it is not essential
22 that the government prove the conspiracy started or ended
23 on or about these specific dates.

24 It is sufficient if you find that in fact the
25 conspiracy was formed and existed for some substantial time

1 lhrp34

2 within the period set forth in the indictment and that
3 an overt act committed in furtherance of its objective
4 was done at or about the time alleged.

5 Turning to Count Three, which you will recall
6 is the count charging Mr. Riker with transporting a motor
7 vehicle in interstate commerce knowing the same to have
8 been stolen, he is charged in that count with having violated
9 Title 18, United States Code, Section 2312, which provides
10 in pertinent part as follows:

11 "Whoever transports in interstate commerce
12 a motor vehicle, knowing the same to have been stolen,
13 is guilty of committing a crime."

14 For purposes of Count Three, let me either
15 refresh your recollection or give you further definitions
16 of the critical terms. I have already talked about
17 interstate commerce, but, again, I will remind you that
18 interstate commerce includes commerce between one state
19 and another. Motor vehicle, as defined, includes an
20 automobile, a truck, a wagon or any other self-propelled
21 vehicle for running on land but not on rails.

22 Obviously, for purposes of this statute, a
23 tractor-trailer is a motor vehicle.

24 I charge you that if you find beyond a reasonable
25 doubt that Mr. Riker transported the 1975 Kenworth tractor-

1 lhrp35

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2 trailer from New Jersey to New York, then he has transported
3 a motor vehicle in interstate commerce within the meaning
4 of this statute.

5 In order to find defendant Riker guilty of
6 the offense charged in Count Three, the government must
7 convince you beyond a reasonable doubt of each of the
8 three following elements:

9 (1) That a Kenworth tractor-trailer bearing
10 vehicle identification No. 241859M had been stolen;

11 (2) That on or about February 5, 1976,
12 Mr. Riker unlawfully, willfully and knowingly transported
13 this motor vehicle in interstate commerce, that is from
14 New Jersey to New York;

15 (3) That Mr. Riker knew the motor vehicle to
16 have been stolen.

17 Let me give you those again.

18 First, that the Kenworth tractor-trailer was
19 stolen;

20 Two, that Mr. Riker drove it from New Jersey
21 to New York unlawfully, willfully and knowingly; and

22 Three, that he knew it to have been stolen.

23 The first and third elements involve the use of
24 the word "stolen," and I have already instructed you on that.
25 That means taking the goods of another with intent to deprive

1 lhrp36

2 the owner of his rights and benefits of ownership therein.

3 I have already explained to you in connection
4 with Count Two the inference which the law permits you
5 to draw but does not require you to draw from the fact
6 of possession of recently stolen property.

7 I remind you of that instruction again, should
8 you decide that it applies here.

9 As I say, you are not required to decide that
10 it applies here.

11 Count Four of the indictment in essence charges,
12 and this is to refresh your recollection, charges that
13 Mr. Riker on or about February 5, 1976, did knowingly
14 receive, unlawfully, willfully and knowingly receive and
15 conceal the said tractor and trailer, which had been moving
16 as and was a part of and constituted interstate commerce,
17 Mr. Riker knowing the same to have been stolen.

18 This charges a violation of Title 18, Section 2313,
19 which provides as follows:

20 "Whoever receives, conceals or disposes of
21 any motor vehicle moving as or which is a part of or which
22 constitutes interstate commerce, knowing the same to have
23 been stolen, commits a crime."

24 Definitions that I earlier gave you of motor
25 vehicle and interstate commerce apply as well to this count.

1 lhrp37

2 In order for you to find defendant Riker guilty
3 of the offense in Count Four, the government must convince
4 you beyond a reasonable doubt of each of the following
5 essential elements:

6 That the Kenworth tractor-trailer had been
7 stolen;

8 That at the time of the theft it was moving as
9 or was a part of or constituted interstate commerce;

10 That on or about February 5, 1976, defendant
11 Riker unlawfully, willfully and knowingly received, con-
12 cealed or stored the tractor-trailer in the Southern Dis-
13 trict of New York, again, keeping in mind that Rockland
14 County, including Nanuet, is in the Southern District;

15 , Four, that defendant Riker at the time he re-
16 ceived, concealed or stored the tractor-trailer knew that
17 it was stolen.

18 Let me read those four to you again:

19 That the Kenworth had been stolen;

20 That at the time it was stolen it was in inter-
21 state commerce;

22 That Mr. Riker on or about February 5th unlawfully,
23 willfully and knowingly received, concealed or stored it in
24 the Southern District; and

25 Four, at that time he knew that it

1 lhrp38

2 was in fact stolen.

3 I have already explained to you in connection
4 with earlier counts the concept of stolen, so I don't need
5 to do that again.

6 The terms receive, conceal and store have
7 their common, everyday meaning in this statute. In this
8 regard the government contends that Mr. Riker received the
9 tractor-trailer in New Jersey, drove it to Nanuet and
10 stored it outside the home of Ronnie Hamilton at 15 Fisher
11 Avenue.

12 If you find beyond a reasonable doubt that the
13 facts in this regard are as the government contends, then
14 this essential element will have been established.

15 In connection with the essential element
16 that Mr. Riker knew the tractor-trailer had been stolen, I
17 remind you again of the inference which the law allows
18 you to draw but does not require you to draw from the fact
19 of possession of recently stolen property.

20 Again, let me remind you that it is not neces-
21 sary for the government to prove that the defendant knew
22 the tractor-trailer had come from another state. This is
23 as to Count Four; in other words, that it had been moving
24 in interstate commerce, in order to sustain it's burden on
25 this count. It is merely enough on this count for you to

1 lhrp39

2 be convinced beyond a reasonable doubt that Mr. Riker
3 knew that the tractor-trailer had been stolen.

4 Let me give you a thought about the concept
5 of interstate commerce in connection with all of these
6 counts.

7 It is applicable wherever you may conclude it
8 is applicable. An article, and here we are talking
9 about a truck, a trailer or its contents, as the case may
10 be, an article that constitutes interstate commerce does
11 not lose interstate character immediately upon its arrival
12 from any one state to another state. If the tractor-trailer
13 with the goods in it was driven from Illinois to New Jersey
14 and goods on the tractor-trailer had not yet been delivered
15 to their ultimate destination at the time the tractor-
16 trailer was stolen, then you may find that the tractor-
17 trailer had not lost its interstate character, even though
18 it may have been stolen in New Jersey and the final destina-
19 tion was somewhere else in New Jersey, because the tractor,
20 the trailer and the goods, I charge you, remain in interstate
21 commerce from the time they leave Illinois until the
22 contents are delivered to the person to whom the merchandise
23 is consigned at the final place of delivery.

24 With regard to Count Four specifically, I want
25 to charge you that if you find the tractor-trailer itself

1 lhrp40

2 was in interstate commerce, it does not matter as to
3 Count Four alone now that Mr. Riker himself possessed
4 it in more than one state or only in one state, because
5 as to Count Four, the essential element is that whereas
6 the tractor had been stolen and had been in interstate
7 commerce, it is only required that Mr. Riker receive,
8 conceal or store it in New York, knowing at that time that
9 it was in fact stolen.

10 I am getting somewhat close to the end.

11 Ladies and gentlemen, I have not referred to
12 much evidence upon which the parties rely and I am not
13 going to review the evidence for you, because while we have
14 heard a number of days of it, the overall factual picture
15 here is not very extensive, and counsel have done an
16 excellent job in bringing it before you in their summations.

17 I do want to say that all evidence, whether or
18 not they referred to it or whether or not I refer to it,
19 is important and should be considered by you, as well as
20 all the contentions offered to you by all of the parties.

21 In referring to testimony by all of us,
22 counsel and Court alike, we all seek to state the sub-
23 stance of it with complete accuracy.

24 Again, I want to say, if there has been any
25 reference to testimony which does not agree with your

1 lhrp 41

2 recollection, you are to disregard that reference, for it
3 is your recollection and yours alone that governs.

4 I also want to say to you that just because
5 evidence is uncontradicted in the record, you need not
6 accept it if you do not find it to be believable. You
7 alone, as I have said before, are called upon to decide
8 the fact issues.

9 How do you do this? Your determination, ladies
10 and gentlemen, on the issues of credibility, if you find
11 them depend upon the impression very largely that a witness
12 or witnesses made upon you.

13 Was that witness telling the truth or was he
14 or she giving you an accurate version of what happened?

15 As I said, when you walk in the door of this
16 courtroom and you sit in that jury box while the trial is
17 going on and while you are deliberating, you keep your
18 common sense and your good judgment with you. You decide
19 whether a witness has told a truthful and a straightforward
20 story, whether a witness has attempted to conceal
21 anything, whether he or she had a motive to testify falsely,
22 whether there is any reason a witness might color his or
23 her testimony.

24 The ultimate question for you to decide in pass-
25 ing upon credibility and believability is did the witness

1 lhrp42

2 that you are considering tell you the truth as to essential
3 matters. It is for you to say whether a witness is truth-
4 ful in whole or in part, in light of his or her demeanor
5 and all the evidence in the case.

6 In considering and evaluating testimony, you
7 may consider the interest or lack of interest of any
8 witness in the outcome of the case, the bias or prejudice
9 of a witness, if you find that he or she had one, the
10 appearance, the manner in which the witness gave testimony
11 on the stand and the opportunity that the witness had
12 to observe or note the facts concerning which he or she
13 testified, the probability or improbability of a witness'
14 testimony when viewed in the light of all the evidence
15 in the case, these are all items to be taken into your
16 consideration in determining the weight, if any, that you
17 will assign to that witness' testimony.

18 The testimony of a witness may fail to conform
19 to the facts as they occurred because he or she is inten-
20 tionally telling a falsehood or because he or she did not
21 accurately see or hear that about which he or she testified
22 or because his or her recollection of the event is faulty
23 or even because he or she has not expressed himself or
24 herself clearly in giving the testimony.

25 You are entitled to consider the possibility

1 lhrp43

2 that where a witness is called upon to testify long after
3 an event and at great length, inconsistent statements may
4 be the result of an innocent mistake or a lapse of memory,
5 rather than a deliberate intention to falsify or shade the
6 facts.

7 In short, it is not unusual in lengthy proceed-
8 ings to utter inconsistencies at some stage along the
9 line. If your consideration of the evidence makes it
10 appear that there are differing versions of the facts result-
11 ing in a discrepancy in the evidence, you will have to
12 consider whether the apparent discrepancy involves under-
13 standable error which can be reconciled by fitting the
14 two stores together in a rational relationship.

15 If, however, you believe this is not appropriate
16 or possible, then you will have to determine which of the
17 conflicting versions you will accept. You may, if you wish,
18 accept so much of the testimony of a witness as you deem
19 true and disregard what you feel is faulty or mistaken or
20 unclear.

21 You are at liberty if you deem it proper under
22 all the circumstances to disbelieve testimony in whole or
23 in part, even though it is not otherwise impeached or contra-
24 dicted. If you find that any witness has testified
25 falsely as to a material fact before you, the law permits

1 lhrp 44

2 you to disregard completely the entire testimony of that
3 witness on the principle that one who testifies falsely
4 about one material fact is quite likely to testify falsely
5 about everything.

6 However, you are not required to consider such
7 a witness as totally unworthy of belief. You may, if you
8 wish, accept so much of his or her testimony as you believe
9 true and reliable and disregard that which you feel is false
10 or unworthy of acceptance.

11 In connection with the question of credibility
12 and particularly the testimony of Ronnie Hamilton, I wish
13 to call to your attention one of the rules of law relating
14 to the testimony of an alleged accomplice.

15 You must realize, I am sure, that in the prosecu-
16 tion of a case the government may be called upon to use
17 witnesses who are accomplices. Often it has no choice.
18 There is no requirement in the federal court that the testi-
19 mony of an accomplice be corroborated. A conviction may
20 rest upon the uncorroborated testimony of an accomplice,
21 if you believe it and if you find it credible.

22 However, such testimony should be viewed with
23 great caution and scrutinized carefully. Did any alleged
24 coconspirator here give false testimony or color testimony
25 contrary to fact hoping that this would result in favorable

1 lhrp45

2 treatment at some time or did such a witness tell the truth
3 as to significant matters?

4 That is a question you may have to decide. There
5 has been testimony here by agents of the Federal Bureau
6 of Investigation as to various statements made by the
7 separate defendants when questioned by law enforcement
8 officers.

9 The government contends that each defendant's
10 statement was at least in part false. If you find that
11 when a defendant was questioned by agents of the FBI that
12 defendant gave a false statement in an attempt to exculpate
13 or exonerate himself, you may consider that false statement
14 as circumstantial evidence from which consciousness of guilt
15 or criminal intent may be inferred, for it is reasonable
16 to infer that an innocent person does not ordinarily find
17 it necessary to invent or fabricate an explanation or state-
18 ment tending to establish his innocence.

19 Whether or not evidence as to any defendant's
20 statement points to consciousness of guilt and the signi-
21 ficance if any to be attached to any such evidence
22 are matters solely for determination by you.

23 You heard the testimony as to these statements.
24 If you find that a defendant whose guilt or innocence
25 you are considering did make the statement, then you may

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2 give that statement such weight you believe it deserves
3 under all the circumstances brought out in the evidence.

4 Obviously as I instructed you along the way
5 in this trial, you are to consider any such statement only
6 as against the defendant who made it and against no
7 other defendant. If the government has failed to call a
8 witness who is equally available to both sides, you may not
9 draw an inference that his testimony would have been un-
10 favorable to the prosecution. There is no presumption
11 against the government for its failure to call witnesses
12 if it should appear to you that the testimony of the wit-
13 ness who was not called would be merely cumulative or
14 repetitive and of no greater value than of that of the
15 witnesses who did testify.

16 The law does not impose upon a defendant the
17 duty to call as witnesses any persons who are shown to
18 have been present at any of the events involved in the
19 evidence or who may appear to have some knowledge of the
20 matters in question. Both sides have the right to inter-
21 view witnesses at any time before or during the trial and
22 both sides have the right to subpoena or request witnesses
23 to appear in court, have the Court pay the witness the
24 legal fee calculated on the mileage to be travelled to and
25 from court and the number of days required for attendance

1 lhrp 47

2 and while waiting and other necessary expenses.

3 Perhaps this is a good place to speak about
4 the question of assessing the testimony of government
5 employees.

6 The fact that certain witnesses were government
7 employees or agents of the FBI does not entitle their
8 testimony to any greater weight or consideration than that
9 accorded any other witness in the case nor does it entitle
10 such a witness to any less consideration than that given
11 any other witness.

12 You are to evaluate the testimony of such a
13 witness the same way you would do that of any other witness.

14 The law permits but does not require a defendant
15 to take the stand on his own behalf. In this case, Mr. Erm
16 and Mr. Riker have both taken the stand. Obviously
17 each has a deep personal interest in the result of this
18 prosecution.

19 Interest, as you are doubtless aware, creates
20 a motive for testifying falsely. The greater the interest,
21 the stronger the motive. A defendant's interest in the
22 result of that case is of a character possessed by no other
23 witness.

24 In appraising the credibility of either Mr. Erm
25 or Mr. Riker, you should take such interest in the outcome

1 lhrp 48

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2 into consideration.

3 However, and I want to say this as firmly and
4 as forcefully as anything I have said before, it by no means
5 follows that simply because a person has a vital interest
6 in the end result that he is not capable of telling you
7 a truthful, straightforward story. It is for you to
8 decide to what extent, if at all, his interest has colored
9 or affected his testimony.

10 Mr. Giordano and Mr. O'Brien did not take the
11 stand before you. Under our constitution, I charge you
12 that a defendant has no obligation to testify or to present
13 any other evidence whatsoever, because, as I said earlier,
14 the burden of proof is solely upon the government as to
15 all the elements of this case and that burden remains upon
16 the government throughout the entire trial and does not
17 shift. Therefore, you are not to and you may not consider
18 in any way whatsoever or attach any significance to the
19 fact that a defendant availed himself of his constitutional
20 right not to testify. No adverse inference may be drawn
21 against him by you because of the exercise of this privilege.
22 In short, the fact that a particular defendant did not
23 testify may not be considered by you at all.

24 Defendants Riker and Erm introduced evidence
25 before you of good reputation in the community for honesty

2 and veracity and I believe truthfulness.

3 Assuming you credit this testimony, you may
4 properly consider whether a person with this character
5 would perpetrate the crimes charged in this indictment.
6 Therefore, you should consider this evidence in the case
7 in determining whether the prosecution has proved either
8 defendant guilty beyond a reasonable doubt.

9 Evidence of good reputation may in and of itself
10 create a reasonable doubt as to guilt where without such
11 evidence no reasonable doubt would exist.

12 On the other hand, if upon all the evidence
13 you are satisfied beyond a reasonable doubt that a
14 defendant is guilty, a showing that he previously enjoyed
15 a reputation of good character does not justify or excuse
16 the offense. You should not acquit him merely because
17 you believe he is a person of good repute.

18 Also I want to charge you that the testimony
19 of a character witness is a reflection of reputation in
20 the community. The testimony of character reputation is
21 not to be taken by you as a witness' opinion as to the
22 guilt or innocence of the defendant on any charge in this
23 indictment.

24 The guilt or innocence of the defendant is for
25 you and you alone to consider. You must consider and I want

1 lhrp50

2 to say this generally, you must consider each defendant
3 separately as if he alone were on trial. You must consider
4 each count separately and you must return a separate
5 verdict as to each defendant and on each count.

6 I am going to give you a few minutes after you
7 retire a verdict sheet which may be of some assistance
8 to you in order to perform these duties. If you fail to
9 find beyond a reasonable doubt that the law has been
10 violated as to any defendant on any count, you should not
11 hesitate for any reason to return a verdict of acquittal.
12 But if on the other hand you should find that the law has
13 been violated as charged, you should not hesitate because
14 of sympathy or other reason to return a verdict of guilty
15 as a clear warning that a crime of this character may not
16 be committed with impunity.

17 The public is entitled to be assured of this.
18 The government, to prevail against any of the defendants,
19 must, as I have said, prove each essential element of each
20 charge by the required degree of proof as I have charged you.
21 If the government succeeds, your verdict should be guilty.
22 If the government has failed, your verdict must be not guilty.

23 Your verdict, ladies and gentlemen, must be
24 unanimous. Under your oath as jurors you cannot and are not
25 to allow any consideration of a sentence which might be

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2 imposed upon a defendant if convicted to enter into your
3 deliberations or influence your verdict in any way. Your
4 duty is to decide the facts here, to decide the case solely
5 and only upon the evidence before you.

6 In the event of a conviction, the duty of
7 imposing sentence rests solely with the Court.

8 Each of you is entitled to his or her own
9 opinion but each of you should exchange views with your
10 fellow jurors. That is what jury deliberation means, to
11 discuss and consider the evidence, to listen to the argument
12 of fellow jurors, to present your individual views and
13 to consult with one another and to reach agreement based
14 solely and wholly on the evidence, if you can do so without
15 violation of your individual judgments. Each must decide
16 the case for himself or herself after a consideration
17 and discussion with his or her fellow jurors, but you
18 should not hesitate to change an opinion which after
19 discussion with your fellows, appears erroneous.

20 However, equally, if after careful consideration
21 of all the evidence, the arguments of your fellow jurors,
22 you entertain a conscientious view that differs from others,
23 you are not to yield your conviction simply because you are
24 outnumbered or outweighed. Your final vote must reflect
25 your conviction as to how the issue should be decided.

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2 If the government has failed to carry its
3 burden, you should acquit. That is your duty. If the
4 government has carried its burden, you must not flinch from
5 your sworn duty, but you must convict.

6 During the course of your deliberations one
7 or more of your members may have a question for the Court
8 or desire to have certain testimony read or desire to have
9 an exhibit in the jury room. If you genuinely have a need
10 for that after discussion, you may communicate with the Court
11 and ask for those things.

12 You may also have other reasons to communicate
13 with the Court, such as when you have reached a verdict.
14 If this occurs, please write me a note. In doing so, I
15 want to caution you that you are not to indicate in any
16 communication to me how your vote, if any, stands at any
17 particular time. Your deliberations are secret and it
18 would be a breach of that secrecy to indicate how you
19 are voting at any time except to, as I say, ask for testi-
20 mony or an exhibit, if that is appropriate, or to announce
21 that you have reached a unanimous verdict.

22 Ladies and gentlemen, that concludes my charge
23 on the law.
24
25

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Pad 2

1 lhrpl

2 (In the robing room.)

3 THE COURT: All right, Mr. Koelzer.

4 MR. KOELZER: Yes, your Honor.

5 I suppose Mr. Jossen ought to go first, if he
6 has anything.

7 THE COURT: Why don't you go first. You are
8 the one who spoke -- any requests or exceptions?

9 MR. KOELZER: Yes, your Honor.

10 Let me run through them as quickly as I can.

11 First, your Honor said at one point that guilt
12 is personal, should be determined separately, I don't
13 dispute that.

14 I think in fairness, in view of the case and
15 the nature of the complexity of the case, the Court should
16 likewise instruct that just because one defendant may be
17 found guilty, it does not follow that others are likewise
18 guilty.

19 The jury I could very well find upon the
20 evidence that one or more defendants is guilty and one or
21 more defendants is not guilty.

22 THE COURT: I will grant that.

23 MR. KOELZER: Second, again, in line with what
24 I said yesterday, I will make this as brief as possible,
25 the Court read the indictment.

1 lhrp2

2 I am concerned about the fact that allegedly
3 the conspiracy lasted until July 22nd. I made my record
4 yesterday on that.

5 I object to that.

6 May I move on?

7 THE COURT: Go ahead.

8 MR. KOELZER: Third, the charge that the Court
9 gave that a conspiracy is a more dangerous claim than the
10 substantive crime, I am paraphrasing, I object to that
11 language.

12 THE COURT: I overrule that objection.

13 MR. KOELZER: The Court's charge on the elements
14 in Title 18, Section 659, Request No. 11 of the government,
15 if the Court will bear with me one second while I turn to
16 it. I had my objection, I made a brief note. Now I can't
17 decipher my handwriting --

18 THE COURT: I shortened that up.

19 MR. KOELZER: One of the things your Honor
20 did, as I recall, and this I don't have in my notes, but
21 your Honor telescoped two elements in one.

22 THE COURT: I did, the third and fourth elements.

23 MR. KOELZER: I object to that. In view of the
24 fact that the knowledge of the goods being stolen is such
25 a crucial part of the defense, I take an exception to that.

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2 THE COURT: That is denied. Exception noted.

3 MR. MONTEFUSCO: I join in that.

4 MR. KOELZER: Your Honor said that when it
5 came to the part about knowingly and willfully participating,
6 your Honor used language, according to my notes, and I tried
7 to quote as best I can, should it become necessary for you
8 to apply those concepts, knowingly and willfully, I think
9 that is susceptible in the jury's mind that they don't have
10 to apply them and they can still find them guilty.

11 I object to that precise language.

12 THE COURT: I told them to view my charge as
13 a whole and I told them that that was an element, knowingly
14 and willfully.

15 MR. KOELZER: The business we discussed yesterday.
16 Request No. 14 of the government, about the inference from
17 possession of recently stolen property.

18 I think it is an infringement on the presumption
19 of innocence, shifts the burden of proof, and I object to
20 that.

21 THE COURT: That is approved in haec verba in
22 412 U. S. 338.

23 MR. KOELZER: The aiding and abetting charge,
24 the first paragraph in Government's Request No. 16, there
25 is nothing in the charge as given by the Court on aiding and

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2 abetting that applies to Count Two -- the only place it would
3 apply is Count Two, the Court never instructed
4 that the aiding and abetting must be done willfully and
5 knowingly.

6 In other words, a person can conceivably un-
7 knowingly, unwittingly aid and abet.

8 The jury could have that concept from the
9 Court's charge. I object to that.

10 In other words, the aiding and abetting -- the
11 language, aid, abet, counsel, command, induce, has to be
12 knowingly and willfully done, it cannot be done unknowingly
13 or unwittingly.

14 I already mentioned the dates in the conspiracy.

15 THE COURT: It seems to me that knowingly and
16 willfully has to be implicit in aiding and abetting, although
17 I don't see any harm --

18 MR. JOSSEN: I have no objection to your Honor
19 instructing the jury that with respect to all the crimes
20 charged in the indictment, the conduct must be knowing and
21 willful.

22 THE COURT: I am only asked as to aiding and
23 abetting.

24 MR. KOELZER: That is one place where it comes
25 up, but of course, it applies throughout.

1 lhrp5

2 THE COURT: Let's go on.

3 MR. KOELZER: I will skip one and get to this
4 because it is crucial.

5 I requested the so-called mere association charge.
6 I submitted it to the Court and the Court gave language
7 in substance about mere association not being sufficient,
8 but as I recall it, and in fact my notes indicate, the
9 Court gave that only in the context of Count One.

10 The mere association charge that I requested
11 applies with equal force as to the substantive count,
12 Count Two.

13 I object to that. It was in the heart of the
14 conspiracy count that the Court gave it. I am positive
15 of that. It applies with equal force to the substantive
16 count.

17 The fact that my defendant may have been there,
18 the fact that he may have even known that a crime was
19 being committed, in the substantive count, now, is not
20 enough to convict him.

21 They have to show that he knowingly and
22 willfully actively participated in it in an attempt to bring
23 about its success.

24 THE COURT: All right.

25 MR. KOELZER: I already mentioned before, your

1 lhrp

2 Honor, I will not elaborate now, but I make my record
3 at this point, on the Court's charge about the dates of
4 the conspiracy.

5 The Court charged about knowingly associating,
6 participating in a conspiracy, but the Court did not
7 charge --

8 THE COURT: Hold on now. That applies to
9 Count Two?

10 MR. KOELZER: Yes. The mere association or
11 presence of a defendant at the commission of a crime,
12 even if he knows, is not enough to convict.

13 THE COURT: All right.

14 MR. KOELZER: The Court charged that, and
15 if I did this already, stop me, that a person knowingly
16 associated or participated in a conspiracy, but the
17 knowledge or participation has to be such as to willfully
18 attempt to bring about the success of the conspiracy.

19 In other words, a person may knowingly do
20 something that is a part of a conspiracy, but if it is
21 done without any idea that he participated in the con-
22 spiracy or that he is trying to bring about the fruits
23 of the conspiracy, he is not guilty.

24 THE COURT: I think I fully charged that.

25 MR. KOELZER: Your honor, I mentioned earlier,

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2 I will not elaborate now, but your Honor charged about
3 you can consider the acts of others to determine whether
4 or not proof aliunde has been met as to my defendant
5 being a member of the conspiracy.

6 I take it the Court's ruling won't change on
7 that.

8 THE COURT: Right.

9 MR. KOELZER: Overt Act No. 3, I object to the
10 Court's charge or reading as to that.

11 There has been absolutely no proof that I
12 recall that Mr. Erm drove away a flatbed truck loaded
13 with canned hams. I object to that.

14 THE COURT: Why didn't somebody move to
15 strike that from the indictment if there was no proof
16 on that?

17 MR. KOELZER: I thought I did.

18 THE COURT: There was no such motion made
19 before me.

20 MR. KOELZER: Further, in this regard, in
21 connection with my motion earlier concerning Mr. Jossen's
22 rebuttal summation, I notice --

23 THE COURT: You did ask me to strike the word
24 "embezzle," which I did, but nobody asked me to strike
25 that out.

1 lhrp

2 MR. JOSSEN: I believe there was evidence from
3 which the jury could infer that.

4 MR. KOELZER: The government in its bill of
5 particulars said that the events on Saturday night of
6 Mr. Erm occurred around 7:30 p.m.

7 The argument in rebuttal which I would like to
8 incorporate by --

9 THE COURT: Save that for later. This has to
10 do with something else.

11 I want to get back to the jury that's sitting
12 in the box there waiting.

13 MR. KOELZER: The Court's charge on interstate
14 commerce as it applies to all counts, I submit that there
15 is an essential difference between the concept of inter-
16 state shipment under 659 and the concept of interstate
17 commerce under the Dyer Act which are the two counts
18 that pertain to Mr. Riker, and I submit that the Court's
19 charge in that regard was error.

20 There is a substantial difference in the two
21 concepts of the interstate shipment under 659 and the
22 interstate commerce under 2313.

23 It seems to me I had to find for Count Three
24 that he drove it across the state line, whereas to the
25 others, I defined what was meant by an interstate shipment

1 lhrp

2 available for Mr. Montefusco and then he declined to
3 use him.

4 MR. KOELZER: I object to the charge very
5 quickly that we made the record before on, about the
6 interest of the defendants who testify.

7 Finally on the character testimony charge,
8 the Court said that it is not permissible to acquit a
9 defendant because a person is a person of good repute,
10 whereas the standard charge as I understand it is that they
11 cannot acquite merely because he had a good reputation.
12 There is a difference, a semantic difference, but I take
13 it that it is a difference that may apply here, because,
14 very frankly, as the Court properly charged, the concept
15 of good character and reputation may in and of itself
16 raise a reasonable doubt.

17 THE COURT: It may.

18 MR. KOELZER: The change in the Court's charge
19 from the past tense to the present tense, I take it or I
20 argue, vitiates the thrust of the charge on character
21 testimony.

22 THE COURT: Mr. Jossen, what do you say to
23 that?

24 MR. JOSSEN: I really don't recall whether
25 your Honor charged in the past tense or not, but I believe

1 lhrp

2 that in the circumstances of your entire charge on evidence
3 of good character, which I think was eminently fair and
4 correct, that there is no need to recharge it again.

5 MR. KOELZER: One more thing.

6 THE COURT: No. I said this:

7 If you are satisfied -- assuming I reach
8 correctly -- that a defendant is guilty, a showing that he
9 previously enjoyed a reputation of good character does
10 not justify or excuse the offense.

11 The pretense, Mr. Koelzer, applied to my
12 following sentence which reads, "You should not acquit
13 him merely because you believe he is a person of good
14 repute."

15 MR. KOELZER: Is a person of good repute.

16 I think the issue is whether he had at the
17 time in February --

18 THE COURT: I don't think that makes a particle
19 of difference.

20 MR. JOELZER: Final point, your Honor, on the
21 false exculpatory statement charge, I submit respectfully
22 that it does not apply since there is no extrinsic proof
23 as to Mr. Erm, and, further, that the Court should have
24 instructed the jury in line with the cases in this circuit,
25 and I refer specifically to United States v. Johnson found

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2 at 513 Fed. 2d and other cases cited therein, that even
3 if they found a statement to be falsely exculpatory, that
4 that in and of itself cannot establish guilt of a defendant,
5 but it can only corroborate an otherwise existing case.

6 Thank you.

7 THE COURT: That exception is noted.

8 Anybody else?

9 MR. MONTEFUSCO: Your Honor, Mr. Koelzer has
10 come up with other arguments that I had to make, so I
11 will just say I join him on those.

12 The only thing I have indication to is my
13 request to charge and Mr. Kelly's request to charge as
14 to defendants Giordano and O'Brien.

15 I believe that request to charge should have
16 been read in its entirety, especially as to the last two
17 lines of it.

18 MR. KELLY: Your Honor, when we were in the
19 robing room yesterday, you indicated that this would be
20 charged as submitted.

21 THE COURT: In substance.

22 I said I would charge in substance, and I
23 have charged everything in here.

24 What do you contend I did not?

25 MR. KELLY: You just had specific terminology

1 lhrp

2 about, maybe it is not strong enough, it says the jury
3 may not infer.

4 What we submitted to you is that there is a
5 line in there, and this is specifically what I want charged,
6 read, the last seven lines of what we submitted to you,
7 that the basic principle of law that the defendant may
8 rely upon, the failure of the government to prove to the
9 satisfaction of each juror beyond a reasonable doubt, it
10 is stronger than I think the language you used, your Honor,
11 "may not."

12 I don't think "may not" in this particular
13 case or in any case is strong enough to convey to the
14 jury what has to be conveyed regarding a defendant not
15 taking the stand in the exercise of his constitutional
16 right.

17 THE COURT: Mr. Jossen, what say you to this?

18 MR. JOSSEN: My recollection of your Honor's
19 instruction is that it fully complied with the applicable
20 instruction that's required when requested by a defendant
21 who doesn't testify.

22 THE COURT: The last several lines.

23 MR. KELLY: The last seven lines, I said,
24 your Honor. If the last four conveys it, I go along
25 with that.

1 lhrp

2 MR. JOSSEN: I believe your Honor did instruct
3 that the law never imposes upon the defendant the burden
4 of proving anything.

5 THE COURT: I said that.

6 MR. MONTEFUSCO: We are not questioning that.
7 What we are saying is that it should be read or told
8 to the jury that the defendant has the right to rely on
9 the fact that the government has not proved its case,
10 period.

11 MR. JOSSEN: I think your Honor also stated
12 in defining reasonable doubt that it can arise from the
13 evidence or the lack of the evidence, which I submit would
14 be sufficient to cover the principle that's referred to.

15 THE COURT: Why don't I give this and then we
16 have no problem.

17 MR. BERNSTEIN: I join in the remarks of my
18 fellow counsel to the extent that they have set them
19 forth and to the extent that they are applicable to the
20 defendant Riker as though I myself had set them forth,
21 and, in addition, I have the following exceptions to
22 your Honor's charge.

23 Your Honor, in his charge concerning reasonable
24 doubt, indicated that if the jury is satisfied beyond a
25 reasonable doubt of the guilt of any defendant, it is their

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2 duty to convict.

3 I take exception to that language. The jury
4 never has a duty to convict. They merely have a duty to
5 listen to your Honor and apply the law as given by your
6 Honor, but there is never a duty on the part of a jury to
7 convict.

8 THE COURT: Exception noted.

9 MR. BERNSTEIN: Secondly, as regards the
10 second count of the indictment relating to Section 659,
11 I do not believe that your Honor adequately explained
12 the fact that while the defendants could knowingly possess
13 the meat in order to be guilty under Section 659, they
14 have to possess, knowingly the meat to have been stolen.

15 I think that your Honor lumped the concepts
16 together, and I don't think that your Honor clearly
17 differentiated between the two concepts, and I take
18 exception to the way your Honor charged the knowing provi-
19 sion of Section 659.

20 THE COURT: Exception noted.

21 MR. BERNSTEIN: I further take specific excep-
22 tion to your Honor charging the jury at that point with
23 reference to inferences to be draw from recently possessed
24 property, unless your Honor also indicated that before any
25 inference can be drawn, the jury had to satisfy themselves

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2 that the defendants possessed it, knowing that the meat
3 had been stolen.

4 THE COURT: Exception noted.

5 MR. BERNSTEIN: I take the same exception to
6 Counts Three and Four, by the way, in the sense that I
7 think that your Honor should have made it plainer that
8 under any of these charges, that even though somebody knew
9 that they had something in their possession -- later on
10 your Honor defined knowingly, you talked about without
11 mistake, accident or negligence.

12 It is clear that much of what was done here
13 was done without mistake, accident or negligence.

14 The question and the focus of "knowingly"
15 should have been upon whether any defendants knew either
16 that the truck, or in Riker's case, knew the truck had been
17 stolen or, under 659, knew that the meat had been stolen.

18 To me, that's the entire thrust of the defense
19 here. It is not a question of mistake.

20 THE COURT: I think you have two things confused
21 here, but, anyway, your exception is noted.

22 MR. BERNSTEIN: I further take exception to the
23 use of the word "inference" in Count Three and Count Four
24 where again you talk about the inference regarding recently
25 stolen property.

1 lhrp

2 Again, as far as I was concerned, it should
3 have been shown again that first they have to decide
4 whether or not the man knew something was stolen.

5 THE COURT: It seems to me the inference
6 can be used to get to the knowledge, and not the other
7 way around.

8 MR. BERNSTEIN: That's what I am concerned
9 about, they are going to bootstrap themselves up from the
10 inference and then from the inference find --

11 THE COURT: Exception noted.

12 MR. BERNSTEIN: I believe Counts Three and Four
13 are inconsistent and either one or the other should be
14 dismissed at this point.

15 They are charging concealing and receiving,
16 and also the theft. I think one is subsumed by the other.

17 THE COURT: Motion denied. Anything else?

18 MR. BERNSTEIN: Yes. I take exception to the
19 way your Honor charged concerning uncontradicted evidence,
20 that the jury had a right to believe just because it was
21 uncontradicted --

22 THE COURT: Had a right not to believe it.

23 MR. BERNSTEIN: That's right, that's what
24 your Honor charged.

25 The jury had a right not to believe evidence

1 lhrp

2 merely because it was uncontradicted.

3 THE COURT: I didn't say that. Your exception
4 is noted.

5 MR. BERNSTEIN: "Just because evidence is un-
6 contradicted, you need not believe it."

7 I believe those were your words.

8 THE COURT: If it does not commend itself to
9 your common sense or your good judgment.

10 MR. BERNSTEIN: I believe, with all due
11 respect, that it was aimed at Mr. Riker, whether or not
12 he took a particular vehicle from a particular spot.

13 THE COURT: Frankly, I had the vision of Ron nie
14 Hamilton in mind while I was saying that.

15 Anything else?

16 MR. KOELZER: May I say in the meantime that
17 I join in the objections with respect to Counts One and
18 Two.

19 With respect to Mr. Bernstein, on the elements
20 of 659 and the element of knowledge, may I simply point
21 out by way of expansion that the crime does not occur
22 under 659 until the goods are actually removed from the
23 truck.

24 In other words, if the truck is stolen in
25 North Bergen, taken to Nanuet, the truck is still in tact,

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2 there is still no theft in interstate shipment. That
3 concept and the fact of the element of knowledge thereafter
4 has never been conveyed to the jury.

5 THE COURT: I don't think that's the law
6 as to Mr. Riker.

7 MR. KOELZER: I am talking only as to Counts
8 One and Two.

9 THE COURT: Even as to Mr. Riker, I don't think
10 that's so.

11 Mr. Riker, it seems to me, was in possession
12 of stolen meat arguably from the minute the truck left --

13 MR. KOELZER: That's not a federal crime,
14 your Honor, under 659, I submit most respectfully, unless
15 the truck has been taken from a truck terminal, and in this
16 case it was taken from a motel.

17 MR. BERNSTEIN: Your Honor, I join in the
18 remark by Mr. Koelzer, and, in addition, your Honor charged
19 that the public is entitled to be assured of this,
20 referring to a conviction, in the event that the evidence
21 proves this.

22 I think the public is equally entitled to
23 be assured of the fact that if the evidence has not been
24 proven beyond a reasonable doubt, the public is entitled
25 to be assured of the fact that the defendants are entitled

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2 to acquittal under those circumstances.

3 MR. KOELZER: I join in that.

4 THE COURT: Exception noted.

5 MR. MONTEFUSCO: Your Honor, for the record,
6 all attorneys join in all cocounsels' objections and
7 exceptions during the course of the trial.

8 MR. KELLY: I join in that.

9 MR. JOSSEN: I believe at one point during
10 your recitation concerning the false exculpatory state-
11 ment, your Honor gave an instruction concerning certain
12 statements coming in for a limited purpose.

13 I would merely suggest that the Court remind
14 the jury again that during the course of the trial there
15 were certain times when evidence came in for a limited
16 purpose, and when that instruction was given, that the
17 jury should keep that in mind in considering that specific
18 evidence.

19 I have in mind specifically the testimony and
20 the government's rebuttal case of Agent Colitre with
21 respect to the statement of Mr. Erm and the limited purpose
22 that that came in for as to solely Mr. Erm's credibility.

23 THE COURT: Why should I get into that at this
24 point?

25 MR. KOELZER: I think the Court covered it.

1 lhrp

2 THE COURT: Anything else?

3 (In open court.)

4 THE COURT: Thank you for your patience.

5 There are two or three little matters that, whether or not
6 I had covered them adequately before, in the event there
7 is any concern on that score, I am going to touch upon
8 them again now.

9 I want to make it perfectly clear to you in
10 connection with pointing out to you that your consideration
11 of each defendant -- as to each defendant, he must be
12 considered separately and guilt is personal.

13 Obviously a corollary of that is that were
14 you to find one defendant guilty, that obviously does not
15 mean that any other defendant is guilty because you found
16 one guilty.

17 Secondly, with regard to my charge on aiding
18 and abetting, which you may remember, obviously an aider
19 and abettor must act knowingly and willfully as an aider
20 and abettor.

21 Please keep that in mind.

22 While I gave a particular charge with regard to
23 the conspiracy count, it was intended by me, and I tell
24 you now that this applies as well to Count Two, which is
25 the count in which all four defendants are charged with

1 lhrp

2 the possession of meat, and that charge went as follows,
3 as this applies there as well.

4 Mere association with another, I said before
5 with a coconspirator, but mere association with another,
6 even coupled with knowledge that a crime is being committed
7 by that other, is not sufficient by itself to convict.
8 Thus, mere presence at the scene of an event alleged to
9 be a crime, even knowing that a crime is being committed
10 is not sufficient to convict on that.

11 This applies equally to Count Two and Count One.

12 Finally, Mr. Giordano and Mr. Erm wish me to
13 make something clear that I trusted was clear, but I will
14 read to you as follows -- I'm sorry, Mr. O'Brien.

15 Mr. O'Brien and Mr. Giordano have asked me to say the
16 following to you. That is that I charge you that a
17 defendant may rely upon the failure of the government
18 to prove to the satisfaction of each of you jurors beyond
19 a reasonable doubt each of the elements of the crime
20 charged.

21 You may retire. First, Mrs. Grubber, I must
22 excuse you at this time with the thanks of all of us
23 for your patient and thoughtful service.

24 (Alternate juror was excused.)

25 (One marshal was duly sworn.)

Rec'd 4/1/77

Mr. Rathenborg
Appellate Section



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